TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 226.

THE LOUISVILLE AND NASHVILLE RAILROAD COMPANY, PETITIONER,

vs.

THE WEST COAST NAVAL STORES COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

FILED JULY 8, 1909.

(18,000)

(19,300.)

SUPREME COURT OF THE UNITED STATES.

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a *Transcript of Record.*

United States Circuit Court of Appeals, Fifth Circuit.

THE LOUISVILLE & NASHVILLE RAILROAD CO., Plaintiff in Error,
versus
THE WEST COAST NAVAL STORES COMPANY, Defendant in Error. } No. 1323.

Error to the circuit court of the United States for the northern district of Florida.

(Original record filed January 11, 1904.)

U. S. circuit court of appeals. Filed Jan. 27, 1904. Charles H. Lednum, clerk.

1 In the Circuit Court of the United States for the Fifth Judicial Circuit, Northern District of Florida.

WEST COAST NAVAL STORES COMPANY, a Citizen of the State of Florida, and Incorporated by the Laws of said State, and Having Its Principal Place of Business Therein,
versus
THE LOUISVILLE & NASHVILLE RAILROAD Company, a Citizen of the State of Kentucky, a Corporation Organized and Constituted by That Name by the Laws of the State of Kentucky. } Damages, $25,000.00.

Be it remembered that, on the thirtieth day of August, in the year of our Lord one thousand nine hundred, came the said West Coast Naval Stores Company, a citizen of the State of Florida, by its attorney, John C. Avery, and filed in the clerk's office of the circuit court aforesaid, its præcipe for the issuance of *summons ad respondendum* to the said defendant, The Louisville & Nashville Railroad Company, which præcipe is in the words and figures following, to wit:

In the Circuit Court of the United States for the Fifth Judicial Circuit, Northern District of Florida.

WEST COAST NAVAL STORES COMPANY, a Citizen of the State of Florida, and Incorporated by the Laws of said State, and Having Its Principal Place of Business Therein,
vs.
THE LOUISVILLE & NASHVILLE RAILROAD Company, a Citizen of the State of Kentucky, a Corporation Organized and Constituted by That Name by the Laws of the State of Kentucky.
} Damages, $25,000.00.

The clerk of said court will please issue a *summons ad respondendum* to the defendant in the above entitled case, and make
2 the same returnable to the rule day of October, A. D. 1900.

JOHN C. AVERY,
Attorney for Plaintiff.

(Indorsed:) West Coast Naval Stores Co. *vs.* L. & N. R. R. Co. Præcipe. Filed August 30th, 1900. F. W. Marsh, clerk. John C. Avery, attorney for plaintiff.

Whereupon, on the same day, to wit: on the thirtieth day of August, A. D. 1900, there issued out of the clerk's office of the said court a *summons ad respondendum*, directed to the marshal of the said district, which was thereupon delivered to him, and by him executed and returned into the said clerk's office with his return indorsed thereon, which writ is in the words and figures following, to-wit:

United States Circuit Court, Fifth Circuit, Northern District of Florida.

The President of the United States to the marshal of the northern district of Florida, Greeting:

You are hereby commanded to summon the Louisville & Nashville Railroad Company, a citizen of the State of Kentucky, a corporation organized and constituted by that name by the laws of the State of Kentucky, if it be found in your district, to be and appear before the circuit court of the United States, fifth circuit and northern district of Florida, at the rule day of said court, to be held at the clerk's office, in the city of Pensacola, on the first Monday of October next to answer unto the West Coast Naval Stores Company, a citizen of the State of Florida, and incorporated by the laws of said State, and having its principal place of business therein, in

said court, on a plea of damages, wherein the plaintiff claims damages to the amount of twenty-five thousand ($25,000.00) dollars, and have you then and there this writ.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, and the seal of this court, at the city of Pensacola, in said district, this 30th day of August, A. D. 1900.

[SEAL.] F. W. MARSH, *Clerk.*

JOHN C. AVERY,
Plaintiff's Attorney.

3 (Indorsed:) No. 66. United States circuit court, northern district of Florida. The West Coast Naval Stores Co. *vs.* Louisville & Nashville Railroad Co. Summons. Issued August 30, 1900. Returnable October 1st, 1900. John C. Avery, plaintiff's attorney.

Marshal's Return.

UNITED STATES OF AMERICA, }
Northern District of Florida, } *ss:*

I hereby certify that I served the annexed summons on the therein named defendants (the president, vice-president, general manager, chairman of the board of directors, nor any of the directors could not be found, they being non-residents of the district), by handing to and leaving a true and correct copy thereof with E. O. Saltmarsh, division superintendent of the defendant, personally at Pensacola, Fla., in said district, on the thirtieth day of August, A. D. 1900.

T. F. McGOURIN,
U. S. Marshal.

Filed September 12th, 1900.

F. W. MARSH, *Clerk.*

And thereafter, to-wit, on the same day, October 1st, 1900, the following declaration was filed in the said cause by the plaintiff, to-wit:

In the Circuit Court of the United States for the Northern District of Florida, at Pensacola.

The West Coast Naval Stores Company, a corporation under the laws, and a citizen, of the State of Florida, the plaintiff, by its attorney, John C. Avery, sues The Louisville & Nashville Railroad Company, a corporation under the laws, and a citizen, of the State of Kentucky, the defendant.

For that, to-wit: before the institution of this suit, the defendant was, in the county and State aforesaid, a common carrier of goods, wares and merchandise for hire; by means of its cars drawn by locomotives over defendant's railways, and the plaintiff was then and there engaged in buying and selling, and shipping from Pensacola and other points in said county, naval stores, consisting of turpentine and rosin, in barrels, which plaintiff conveyed to and from its yard, in said county, and warehouse in the city of Pensacola, by means of defendant's cars and locomotives, over defendant's railway, including a switch, constructed by defendants for plaintiff from defendant's main line running into the city of Pensacola, to and into plaintiff's said yard; and the plaintiff in fact avers that the course of business dealing between plaintiff and defendant, then and there, was for plaintiff to transport over said switch and
4 defendant's railway, into the city of Pensacola, by means of defendant's cars and locomotives, plaintiff's turpentine and rosin to and upon defendant's wharf extending into the bay of Pensacola, which wharf was and is conducted by defendant and used by persons bringing goods over defendant's railway to and into Pensacola, to be shipped from said wharf, and at and upon said wharf to deliver plaintiff's turpentine and rosin to vessels, to be in and by such vessels carried to other ports in the prosecution of plaintiff's business, of which the defendant had notice; and it was the duty of the defendant, as common carrier, as aforesaid, and in the conduct of the wharf, as aforesaid, for a reasonable compensation, which plaintiff was always ready and willing to pay defendant, to give to the plaintiff the facilities aforesaid; and plaintiff further in fact avers that all of the service in fact rendered, as aforesaid, to it by the defendant, was for hire, by the plaintiff to the defendant, paid as and when required; and it was the purpose and intention of the plaintiff thereafter to continue to prosecute its business aforesaid, of which defendant had notice, and in the prosecution thereof to *to* continue to use the facilities aforesaid as defendant well knew paying therefor reasonable and customary hire; and plaintiff had the means and ability, and had made necessary arrangements, for the further prosecution of such business, as the defendant well knew; and the plaintiff further in fact avers that, in the midst of the prosecution of its said business, which, as plaintiff avers, was a large and lucrative business, the defendant notified plaintiff that it would not carry plaintiff's turpentine and rosin, of which plaintiff then and there had on hand a large and valuable stock, as defendant well knew, and to which it was constantly adding, as defendant well knew, and from thence hitherto has continued to add in the prosecution of its said business, and that it, the said defendant, would refuse, and did refuse, to transport, and from thence hitherto it has continued to refuse, to transport plaintiff's turpentine and rosin over its said railway to its said wharf, to be there loaded on certain vessels, with the managers of which plaintiff had contracted for the taking thereof from Pensacola to other ports, to which plaintiff in-

tended to ship the same, of which defendant had notice, or to permit the plaintiff to deliver its said turpentine and rosin at said wharf to said vessels, or to permit said wharf or said railway of defendant to be used in the prosecution of plaintiff's business in so far as the same should involve the use of the said vessels in the shipment of plaintiff's said turpentine and rosin from Pensacola; by means whereof plaintiff sustained great loss and damage, to-wit: five thousand dollars ($5,000.00) for the difference between what it would have cost the plaintiff to carry the same to and load it upon the said vessels by means of defendant's railway and wharf, and what it cost to do so by other means of conveyance and delivery; and in the sum of ten thousand dollars ($10,000.00) for what it will cost plaintiff hereafter to make delivery to said vessels in excess of what it would cost to make such delivery by means of defendant's said railway and wharf; and in the sum of ten thousand dollars ($10,000.00) on account of delays, annoyances and embarrassments, resulting from being compelled to carry on its business by transporting its goods in carts drawn by mules and horses for miles by sand roads and streets, and then shipping the same out to said vessels by means of lighters, and the necessary and inevitable general immediate injury to the business of plaintiff by having to carry on its business by such rude and primitive methods side by side with modern modes and facilities, thereby losing prestige in the business community, and being forced to compete with others who have and enjoy unrestricted and unlimited use of defendant's railway and wharf facilities, as aforesaid; and plaintiff is otherwise, by reason of the actings and doings of the defendants aforesaid, greatly damaged in its business.

And plaintiff claims damages in the sum of twenty-five thousand dollars ($25,000.00), and therefore it sues, &c.

JOHN C. AVERY,
Attorney for Plaintiff.

(Indorsed:) West Coast Naval Stores Co. *vs.* Louisville & Nashville R. R. Co. Declaration. Filed October 1st, 1900. F. W. Marsh, clerk. John C. Avery, att'y for pl't'ff.

And thereafter, on the fourth day of March, 1901, the plaintiff, by its attorney, came into court, and filed therein an additional count to its declaration heretofore filed in the said cause, which is in the words and figures following, to-wit:

In the Circuit Court of the United States, Northern District of Florida, at Pensacola.

THE WEST COAST NAVAL STORES COMPANY
vs.
LOUISVILLE & NASHVILLE RAILROAD CO.

Plaintiff amends its declaration by adding thereto the following count:

6 2. For that, to-wit: before the institution of this suit, the defendant was, in the county of Escambia and State of Florida, a common carrier of goods, wares and merchandise, for hire, by means of its cars drawn by locomotives over defendant's railway; and the plaintiff was then and there engaged is buying and selling and shipping from Pensacola and other points in said county, naval stores consisting of turpentine and rosin in barrels, which plaintiff conveyed to and from its yard, in said county, and warehouse, in the city of Pensacola, by means of defendant's cars and locomotives over defendant's railway, including a switch constructed by defendant for plaintiff from defendant's main line, running into the city of Pensacola, to and into the said yard; and the plaintiff in fact avers that the course of business dealing between plaintiff and defendant then and there was for plaintiff to transfer over said switch and defendant's railway, into the city of Pensacola, by means of defendant's cars and locomotives, plaintiff's turpentine and rosin to and upon defendant's wharf, extending into the bay of Pensacola, which wharf was and is conducted by defendant and used by persons bringing goods over defendant's railway to and into Pensacola, to be shipped from said wharf, and at and upon said wharf to deliver plaintiff's turpentine and rosin to vessels, to be in and by such vessels carried to other ports in the prosecution of plaintiff's business, of which defendant had notice; and it was the duty of the defendant, as common carrier, as aforesaid, and in the conduct of the wharf, as aforesaid, which was and is a public wharf, for a reasonable compensation, which plaintiff was always ready and willing to pay to defendant, to give to the plaintiff the facilities aforesaid; and plaintiff further in fact avers that all of the services in fact rendered as aforesaid to it by the defendant was for hire by the plaintiff to the defendant paid as and when required, and it was the purpose and intention of the plaintiff thereafter to continue to prosecute its business aforesaid, of which defendant had notice, and in the prosecution thereof to continue to use the facilities aforesaid, as defendant well knew, paying therefor reasonable and customary hire; and plaintiff had the means and ability, and had made necessary arrangements, for the further prosecution of such business, as the defendant well knew; and the plaintiff in fact avers that in the midst of the prosecution of its said business, which, as plaintiff avers, was a large and lucra-

tive business, the defendant notified plaintiff that it would refuse to permit plaintiff's turpentine and rosin, of which plaintiff then and there had on hand a large and valuable stock, as defendant well knew, and to which plaintiff was constantly add-
7 ing, as defendant well knew, and from thence hitherto has continued to add in the prosecution of its said business, to be at, from or by means of defendant's said wharf loaded upon or delivered to certain vessels, with the managers of which plaintiff had contracted for the taking thereof from Pensacola to other ports to which plaintiff intended and had made arrangements to ship the same, of which defendant had notice; or to permit the said wharf and said railway of defendant to be used in the prosecution of plaintiff's business aforesaid, in so far as the prosecution thereof should involve the use of said vessels in shipment of plaintiff's said turpentine and rosin from Pensacola, by means whereof plaintiff sustained great loss and damage, to-wit: five thousand dollars ($5,000.00), for the difference between what it would have cost plaintiff to carry the same to and load it upon the said vessel by means of defendant's railway and wharf, and what it cost to do so by other means of conveyance and delivery; and in a sum of ten thousand dollars ($10,000.00) for what it will cost plaintiff hereafter to make delivery to said vessels in excess of what it would cost to make such delivery by means of defendant's said railway and wharf; and in the sum of ten thousand dollars ($10,000.00), on account of delays, annoyances and embarrassments resulting from the plaintiff being compelled to carry on its business by transporting its goods in carts drawn by mules and horses for miles by sand roads and streets, and then shipping the same out to said vessels by means of lighters, and the necessary and inevitable general immediate injury to the business of plaintiff by plaintiff having to carry on its business by such rude and primitive methods side by side with modern modes and facilities, thereby losing prestige in the business community and being forced to compete with others who have and enjoy unrestricted use of defendant's railway and wharf facilities, as aforesaid and plaintiff is otherwise, by the actings and doings of defendant aforesaid, greatly damaged in its business.

JNO. C. AVERY,
Attorney for Plaintiff.

(Indorsed:) West Coast Naval Stores Co. *vs.* L. & N. R. R. Co. Additional count. Copy received this 2nd day of March, A. D. 1901. W. A. Blount, att'y for def't. Filed March 4th, 1901. F. W. Marsh, clerk. Jno. C. Avery, att'y for pl't'ff.

8 To these counts the defendant filed several pleas, among them a plea numbered three. The plaintiff demurred to the said plea three; the court overruled the demurrer, and final judgment was entered against the plaintiff, whereupon it sued out a writ of error to the circuit court of appeals of the fifth judicial circuit of

the United States, at New Orleans, and it was, upon consideration by said court, ordered that the judgment of the said circuit court be reversed and the cause remanded with instructions to sustain the demurrer of the plaintiff to the third plea filed by the defendant, and otherwise to proceed according to law as evidenced by the mandate of the said circuit court of appeals filed in the said circuit court on April 30, A. D. 1903. In accordance with said mandate an order was entered sustaining the demurrer to the said plea three and giving leave to the parties to amend as they might be advised.

Said third plea is as follows:

3. That the defendant has adequate depots and yards in the city of Pensacola for the receipt and delivery of all merchandise committed to it for transportation to and delivery at Pensacola. That neither its charter, nor any statutary law has compelled or required, or compels or requires, it to construct or maintain the wharf mentioned in the declaration, but that it constructed the same at an expense to it of tens of thousand- of dollars, for the purpose of providing facilities for the transaction of such business as it might desire with such vessels as it might permit to come to and lie at said wharf to take cargo. That in accordance with such purpose, it made and promulgated, upon the construction of said wharf, and more than five years prior to the bringing of this suit, rules and regulations, by which it limited the use of its wharves, including the wharf mentioned in the declaration, "to traffic handled by vessels in regular lines running in connection with the Louisville & Nashville railroad, and vessels belonging to or consigned to Gulf Transit Company" (an agency of defendant), and making the use of said wharves "for traffic in connection with vessels other than herein referred to," "subject to special arrangement." The said rules and regulations were in operation and enforced by defendant from the time of their promulgation, as aforesaid, up to and at the time of the refusal of the defendant to permit the naval stores of the plaintiff to be loaded from its wharf into the "certain vessels" mentioned in the declaration, and still are in force and operation. That the said "certain vessels" were not regular
9 lines running in connection with the Louisville & Nashville railroad, nor were they belonging to or consigned to Gulf Transit Company, nor had they made any special arrangements with the defendant for the use of the said wharf, but that said vessels constituted an independent line between New York and Pensacola, and New York and Mobile, Alabama, carrying merchandise between the said points, and would have come in competition with a line of steamers with which the defendant was then negotiating for regular service in the transportation of merchandise to and from New York and Pensacola in connection and under traffic arrangements with defendant, and such service has since been established, and a line of steamers is now regularly transporting merchandise between said points in such connection, and under such traffic arrangements; and was also in competition with the defendant

itself, which was, at said time and had been for a long time prior thereto, engaged in a like business between said points, carrying goods by its line of railroad from Pensacola and Mobile to River Junction, Florida, Cincinnati, Ohio, and Montgomery, Alabama, and there delivering the same to a connecting carrier and other carriers connecting therewith, transporting goods to the city of New York, and receiving from said connecting carriers at the points aforesaid, and transporting to Pensacola and Mobile goods shipped from New York to Pensacola and Mobile. That the defendant has not either notified plaintiff that it would not carry plaintiff's naval stores, nor refused to transport plaintiff's naval stores over its railway mentioned in the declaration, to and on its wharf also mentioned in the declaration; that it has at all times so transported them when requested so to do by the plaintiff. That the defendant has refused to permit the certain vessels mentioned in the declaration to take goods and merchandise from its said wharf to be transported by them to the port of New York, as aforesaid, but that such refusal was solely because the said vessels were not of either of the classes provided for by the rules aforesaid, nor had made special arrangements with the defendant, and would have been, as aforesaid, in competition with the lines of vessels connecting with the defendant running to and from New York, and was, as aforesaid, in competition with the defendant itself, in its rail transportation aforesaid, to and from New York city, and that the defendant was then, and at all times, had been, ready and willing to give, and did give, to the plaintiff, the same facilities for shipping naval stores to New York or any other port, over defendant's said wharf, as it gave to any and all other shippers.

BLOUNT & BLOUNT,
Attorneys for Defendant.

E. O. Saltmarsh, being duly sworn, says that he is agent of the defendant, and that the foregoing pleas are true.

E. O. SALTMARSH.

Sworn to and subscribed before me, this 14th day of March, A. D. 1902.

F. B. BONIFAY,
[SEAL.] *Notary Public.*

(Indorsed:) West Coast Naval Stores Co. *vs.* Louisville & Nashville R. R. Co. Pleas. Filed March 14th, 1902. F. W. Marsh, clerk. Blount & Blount, Pensacola, Fla.

Indorsed: West Coast Naval Stores Co. *vs.* L. & N. Railroad Co. Amendment of declaration. Filed November 3rd, 1903. F. W. Marsh, clerk. J. C. Avery, att'y for pl'ff.

And on the same day, to-wit: on the 3rd day of November, A. D. 1903, the defendant herein, by its attorney, came into court and filed the following pleas in the said cause, to-wit:

In the United States Circuit Court, Northern District of Florida.

WEST COAST NAVAL STORES Co.
vs.
LOUISVILLE & NASHVILLE RAILROAD Co.

The defendant, withdrawing all former pleas, pleads to the first and second counts of the declaration as follows:

1. That, the defendant has adequate depots and yards in the city of Pensacola for the receipt and delivery of all merchandise committed to it for transportation to, and delivery at, Pensacola. That neither its charter, nor any statutory law has compelled or required, or compels or requires it to construct or maintain the wharf mentioned in the declaration, but that it constructed the same at an expense to it of tens of thousands of dollars, for the purpose of providing facilities for the transaction of its business with such vessels as it might permit to come to and lie at said wharf to take cargo.

That no business has ever been done at said wharf except the
11 transportation by the defendant in cars on its railroad over said wharf to and from vessels lying at the said wharf, of goods brought, or to be transported, by said vessels and the loading and unloading thereat of such vessels. That in accordance with such purpose, it made and promulgated, upon the construction of said wharf, and more than five years prior to the bringing of this suit, rules and regulations, by which it limited the use of its wharves, including the wharf mentioned in the declaration, "to traffic handled by vessels in regular lines running in connection with the Louisville & Nashville railroad, and vessels belonging to, or consigned to, Gulf Transit Company" (an agency of defendant,) and making the use of said wharves "for traffic in connection with vessels other than herein referred to," "subject to special arrangement." The said rules and regulations were in operation and enforced by defendant from the time of their promulgation, as aforesaid, up to, and at the time of, the refusal of the defendant to permit the naval stores of the plaintiff to be loaded from its wharf into the "certain vessels" mentioned in the declaration, and still are in force and operation. That the said "certain vessels" were not regular lines running in connection with the Louisville & Nashville railroad, nor were they belonging to, or consigned to, Gulf Transit Company, nor had they made any special arrangements with the defendant for the use of the said wharf, but that said vessels constituted an independent line between New York and Pensacola, and New York and Mobile, Alabama, carrying merchandise between the said points, and would have come in competition with a line of steamers with which the defendant was then negotiating for regular service in the transportation of merchandise to and from New York and Pensacola in connection, and under traffic arrangements, with defendant, and such service has since been estab-

lished, and a line of steamers is now regularly transporting merchandise between said points in such connection, and under such traffic arrangements; and was also in competition with the defendant itself, which was, at said time, and had been for a long time prior thereto, engaged in a like business between said points, carrying goods by its line of railroad from Pensacola and Mobile to River Junction, Florida, Cincinnati, Ohio, and Montgomery, Alabama, and there delivering the same to a connecting carrier and other carriers connecting therewith, transporting goods to the city of New York, and receiving from said connecting carriers at the points aforesaid, and transporting to Pensacola and Mobile, goods shipped from New York to Pensacola and Mobile.

12 That the defendant has not either notified plaintiff that it would not carry plaintiff's naval stores, nor refused to transport plaintiff's naval stores over its railway mentioned in the declaration, to and on its wharf also mentioned in the declaration; that it has at all times so transported them when requested so to do by the plaintiff. That the defendant has refused to permit the certain vessels mentioned in the declaration, to take goods and merchandise from its said wharf to be transported by them to the port of New York, as aforesaid, but that such refusal was solely because the said vessels were not of either of the classes provided for by the rules aforesaid, nor had made special arrangements with the defendant, and would have been, as aforesaid, in competition with the lines of vessels connecting with the defendant running to and from New York, and was, as aforesaid, in competition with the defendant, itself, in its rail transportation aforesaid, to and from New York city, and that the defendant was then, and at all times had been, ready and willing to give, and did give, to the plaintiff, the same facilities for shipping naval stores to New York or any other port, over defendant's said wharf, as it gave to any and all other shippers; that the unloading by the plaintiff of its said goods into said vessels necessarily involves the lying at, attachment to, and use of the said wharf, one of the terminals of the defendant, by the said vessels; that the said wharf was not at the time mentioned in the declaration, and has never been a public wharf, unless the facts set forth hereinbefore in this plea constituted it such.

W. A. BLOUNT,
Attorney for Defendant.

E. O. Saltmarsh being duly sworn, says that he is agent of the defendant, and that the foregoing pleas are true.

E. O. SALTMARSH.

Sworn to and subscribed before me this 3rd day of November, A. D. 1903.

W. W. WEEKLEY,
[SEAL.] *Notary Public.*

My commission expires Aug. 7th, 1907.

Endorsed: West Coast Naval Stores Co. *vs.* L. & N. R. R. Co. Pleas. Filed November 3rd, 1903. F. W. Marsh, clerk.

13 And on the same day, to-wit: on the third day of November, A. D. 1903, the plaintiff in the above entitled cause filed a demurrer to the foregoing plea of the defendant, which demurrer is in the words and figures following, to-wit:

In the Circuit Court of the United States for the Northern District of Florida, at Pensacola.

WEST COAST NAVAL STORES COMPANY, a Corporation, Plaintiff,
vs.
LOUISVILLE & NASHVILLE RAILROAD COMPANY, a Corporation, Defendant.

The plaintiff demurs to defendant's plea last filed withdrawing all former pleas, and plead- to the first and second counts of the declaration, because the same is bad in substance, and for ground of demurrer says:

1. That the said plea, by its allegations, shows that it was the duty of the defendant to permit the plaintiff to load on said certain vessels plaintiff's turpentine and rosin mentioned in the declaration; and does not deny that the defendant refused to permit plaintiff so to do;

2. That the said plea, by its allegations, shows that the defendant has violated its duty to the plaintiff, as in the declaration alleged;

3. That the said plea, by its allegations, shows that the defendant, by the acts complained of in the declaration, has damaged plaintiff, as alleged;

4. That the said plea, by its allegations, shows that defendant's said wharf is a public wharf;

5. That the said plea, by its allegations, shows that the said certain vessels mentioned in the declaration would not have come in competition with the defendant;

6. That the said plea, by its allegations, shows that at the time of the commission of the said acts in the said declaration complained of, the said certain vessels in the declaration mentioned were not in competition with any line of steamers then engaged in the transportation of merchandise to and from New York and Pensacola in connection and under traffic arrangements with defendant;

7. That the said plea, by its allegations, fails to show that the said certain vessels in the declaration mentioned would, by receiving the plaintiff's said rosin and turpentine in the declaration mentioned, have injured the defendant, or any person or persons
14 then having or contemplating traffic arrangements with defendant;

8. That the said plea, by its allegations, fails to show that the

defendant had authority to establish a line of steamers between Pensacola and New York;

9. That the said plea, by its allegations, fails to show that the relations between the defendant and the said line of steamers, alleged to be now regularly transporting merchandise between Pensacola and New York, in connection with the defendant, is acting under such conditions and arrangements with defendant as render such line a part of the system of defendant in such manner as to make it legal for defendant to do and act in regard to plaintiff in such manner as in the declaration complained of;

10. That the said plea, by its allegations, fails to show that the said line of steamers mentioned in the plea is so situated and circumstanced in regard to defendant as to entitle defendant to set up the defense stated in said plea;

11. That the said plea, by its allegations, fails to show that the defendant is so situated and circumstanced in regard to the said line of steamers mentioned in the said plea, as to entitle the defendant to set up the defense stated in said plea;

12. That the said plea is otherwise insufficient and bad in substance.

JNO. C. AVERY,
Pl'ff's Att'ys.

11-3-'03.

I, John C. Avery, attorney for plaintiff in the above stated case, certify that in my opinion the foregoing demurrer is well founded in point of law.

JNO. C. AVERY,
Att'y for Pl'ff.

Personally before me appeared Jno. C. Avery, who, being sworn, says that he is attorney of The West Coast Naval Stores Company, the plaintiff, and that the foregoing demurrer is not interposed for the purpose of delay.

JNO. C. AVERY.

Sworn to and subscribed before me this — day of November, 1903.

——— ———,
Notary Public.

(Indorsed:) West Coast Naval Stores Co. *vs.* Louisville & Nashville Railroad Co. Demurrer to plea. Filed November 3rd, 1903. F. W. Marsh, clerk. Avery & Avery, att'ys for pl'ff.

15 And thereafter, to-wit: on the fifth day of November, A. D. 1903, the court made and caused to be entered of record in the foregoing cause, the following order, to-wit:

In the Circuit Court of the United States for the Northern District of Florida, at Pensacola.

WEST COAST NAVAL STORES COMPANY, a Corporation, Plaintiff,
vs.
LOUISVILLE & NASHVILLE RAILROAD COMPANY, a Corporation, Defendant.

This case coming on to be heard on demurrer to defendant's plea last filed, after withdrawal of all other pleas, and the same having been argued by counsel for the respective parties and considered by the court:

It is ordered and adjudged, that the said demurrer be, and the same is, sustained, with leave to defendants to plead over within two (2) days.

Thus done and ordered at Pensacola, this 5th of November, A. D. 1903.

CHAS. SWAYNE, *Judge.*

(Indorsed:) West Coast Naval Stores Co. *vs.* L. & N. R. R. Co. Order sustaining demurrer to plea. Filed November 5th, 1903. F. W. Marsh, clerk.

And thereafter, to-wit on the 7th day of November, A. D. 1903, the plaintiff, by *his* attorney, came into court and filed with the clerk thereof, a præcipe for default against the defendant, which præcipe is in the words and figures following, to-wit:

In the Circuit Court of the United States for the Northern District of Florida, at Pensacola.

WEST COAST NAVAL STORES COMPANY, a Corporation, Plaintiff,
vs.
LOUISVILLE & NASHVILLE RAILROAD COMPANY, a Corporation, Defendant.

16 The clerk of said court will please enter default against defendant in the above stated case this day for want of plea.

JNO. C. AVERY,
Att'y for Pl'ff.

(Indorsed:) West Coast Naval Stores Co. *vs.* L. & N. R. R. Co. Præcipe for default. Filed November 7th, 1903. F. W. Marsh, clerk.

Whereupon, the clerk of said court entered on the 9th day of November, A. D. 1903, the following order, to-wit:

THE WEST COAST NAVAL STORES COMPANY
vs.
THE LOUISVILLE & NASHVILLE RAILROAD COMPANY.

The defendant having been directed and required by the court on the fifth day of November, A. D. 1903, to file its plea or pleas, within two days from said date, and there being no pleas or demurrers now pending and undisposed of to the plaintiff's declaration, and the plaintiff by præcipe filed November 7th, 1903, claiming and directing a judgment by default against the said defendant, for lack of plea to the declaration:

It is, therefore, ordered and adjudged that the plaintiff have, and the same is hereby entered, a judgment by default in relation to matters and things in its declaration alleged, and that it do have the right to proceed further in the premises according to law and assess its damages aforesaid.

Done this 9th day of November, A. D. 1903.

F. W. MARSH, *Clerk.*

And thereafter, to-wit: on the 10th day of November, A. D. 1903, the following proceedings were had in open court, to-wit:

THE WEST COAST NAVAL STORES COMPANY, a Corporation,
vs.
THE LOUISVILLE & NASHVILLE RAILROAD COMPANY, a Corporation.
Law. No. 66.

Damages, $25,000.00.

17 This cause coming on to be heard upon the judgment by default heretofore entered herein, against the defendant, for lack of plea or other defense, and for the assessment of damages sustained by the plaintiff by reason of the acts and things alleged in its declaration:

Whereupon, by agreement and consent of counsel, came the following jury, to-wit: 1. John White, 2. Joseph Marquis, 3. Ed. W. Lawrence, 4. Chas. L. Mann, 5. D. Levy. 6. John E. Maxwell, 7. John A. Merritt, 8. Charles W. Merritt, 9. J. F. L. Quina, 10. F. E. Glackmeyer, 11. John J. Price, 12. John Pons, who being duly chosen, tried and sworn, and after hearing the evidence and upon admissions of counsel in the cause, returned the following verdict, to-wit: "We, the jury, assess the damages in this cause at the sum of one thousand dollars, Pensacola, Nov. 10, 1903. John A. Merritt, foreman."

Whereupon, it is considered, ordered and adjudged by the court, that the plaintiff, The West Coast Naval Stores Company, a corpo-

ration, do have and recover of and from the defendant, The Louisville & Nashville Railroad Company, a corporation, the sum of one thousand ($1,000.00) dollars, and the costs of this cause, taxed at the sum of $72.35, and that the plaintiff do have execution therefor.

And thereafter, to-wit: on the 18th day of November, A. D. 1903, came the said defendant, by its attorney, and filed in the office of the clerk of said court its petition for an appeal, which, together with the order made thereon, is in the words and figures following, to-wit:

In the Circuit Court of the United States, Northern District of Florida.

WEST COAST NAVAL STORES COMPANY, a Corporation of the State of Florida, Plaintiff,
vs.
LOUISVILLE & NASHVILLE RAILROAD COMPANY, a Corporation of the State of Kentucky, Defendant.

To the honorable judges of the said court:

Now comes the said Louisville & Nashville Railroad Company, a corporation under the laws of the State of Kentucky, by its attorney, William A. Blount, and complains that in the record and pro-
18 ceedings, and also the rendition of the judgment in the suit between it, defendant, and The West Coast Naval Stores Company, plaintiff, wherein final judgment was rendered at Pensacola on the 10th day of November, A. D. 1903, manifest error has occurred and intervened, to the great damage of the said defendant.

Wherefore, the said defendant prays for the allowance of a writ of error and such other process as may cause the same to be corrected by the circuit court of appeals of the United States for the fifth circuit.

W. A. BLOUNT,
Attorney for Defendant.

This writ is allowed and supersedeas bond fixed for the sum of two thousand dollars ($2,000.00).

CHAS. SWAYNE, *Judge.*

(Indorsed:) West Coast Naval Stores Co. *vs.* Louisville & Nashville R. R. Co. Prayer for allowance of writ of error. Filed November 13th, 1903. F. W. Marsh, clerk. Blount & Blount, Pensacola, Fla.

And at the same time and on the same day, the said defendant, by its attorney, filed its assignment of error, which is in the words and figures following, to-wit:

In United States Circuit Court, Northern District of Florida, at Pensacola.

WEST COAST NAVAL STORES COMPANY, a Corporation of the State of Florida,
vs.
LOUISVILLE & NASHVILLE RAILROAD COMPANY, a Corporation of the State of Kentucky.

And now comes the said defendant, by its attorney, and says that in the record and proceedings aforesaid, there is a manifest error, to-wit:

1. The court erred in sustaining the demurrer of the plaintiff to the plea of the defendant to the first and second counts of the declaration.

19 Wherefore, the defendant, The Louisville & Nashville Railroad Company, prays that the judgment aforesaid may be reversed.

W. A. BLOUNT,
Attorney for Defendant.

(Indorsed:) West Coast Naval Stores Co. *vs.* Louisville & Nashville R. R. Co. Assignment of error. Filed November 13th, 1903. F. W. Marsh, clerk.

And at the same time and on the same day, came the defendant, The Louisville & Nashville R. R. Co., by its attorney, and filed and caused to be approved the following bond and undertaking, which is in the words and figures following, to-wit:

Know all men by these presents: That we, the Louisville & Nashville Railroad Co., a corporation, and F. C. Brent and W. H. Knowles, are held and firmly bound unto the West Coast Naval Stores Company, a corporation, in the sum of two thousand dollars ($2,000.00), for the payment whereof well and truly to be made, we bind ourselves, our heirs, executors and administrators forever, jointly and severally, firmly by these presents.

Signed and sealed with our seals and dated this 15th day of November, A. D. 1903.

Whereas, lately at a session of the circuit court of the United States for the northern district of Florida, held at Pensacola, on the 10th day of November, 1903, in a suit depending in the said court between West Coast Naval Stores Company, a corporation, plaintiff, and The Louisville & Nashville Railroad Company, a corporation, defendant, and the said Louisville and Nashville Railroad Company, a corporation, being about to obtain a writ of error to reverse the judgment in the aforesaid suit, and a citation directed to the said West Coast Naval Stores Company, citing and admonishing it

to be and appear before the United States circuit court of appeals for the fifth circuit to be holden at New Orleans within thirty (30) days from the date thereof.

Now, the condition of the above obligation is such that, if the said Louisville & Nashville Railroad Company, a corporation, shall prosecute its writ to effect, and answer all damages and costs if it fail to make good its appeal, then the above obligation to be void, else to remain in full force and virtue.

LOUISVILLE & NASHVILLE RAILROAD COMPANY,
By E. O. SALTMARSH, *Supt.*

[Louisville & Nashville R. R. Co., Corporate Seal.]

F. C. BRENT. [SEAL.]
WM. H. KNOWLES. [SEAL.]

Personally before me came F. C. Brent and W. H. Knowles, who being sworn says each for himself that he is worth in visible property in the State of Florida more than $2,000.00 in excess of legal exemptions.

F. C. BRENT.
WM. H. KNOWLES.

Sworn to and subscribed before me this 11th day of November, 1903.

W. N. ROBERTS,
[SEAL.] *Notary Public.*

My commission expires Oct. 6, 1907.

The foregoing bond is approved and accepted for writ of error and supersedeas.

——— ———, *Judge.*

(Indorsed:) West Coast Naval Stores Co. *vs.* Louisville & Nashville R. R. Co. Bond. Taken and approved this 13th day of November, 1903. Chas. Swayne, judge. Filed November 13th, 1903. F. W. Marsh, clerk.

And thereupon, and on the same day, to wit: on the 13th day of November, A. D. 1903, in pursuance of the said appeal, there issued out of said court a citation, which, together with the service made thereon, is in the words and figures following, to-wit:

The President of the United States to the West Coast Naval Stores Company, a corporation, Greeting:

You are hereby cited and admonished to be and appear before the United States circuit court of appeals for the fifth circuit, at New Orleans, Louisiana, on the ninth day of December, A. D. 1903,

pursuant to a writ of error sued out and filed in the clerk's office of the circuit court of the United States for the northern district of Florida, at Pensacola, in a cause wherein The West
21 Coast Naval Stores Company is plaintiff, and The Louisville & Nashville Railroad Company, a corporation, is defendant, to show cause, if any there be, why the judgment rendered against the said Louisville & Nashville Railroad Company, a corporation, as in said writ mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States, this 13th day of December, in the year of our Lord, one thousand, nine hundred and three.

CHAS. SWAYNE, *Judge.*

(Indorsed:) West Coast Naval Stores Co. *vs.* Louisville & Nashville R. R. Co. Citation. Filed November 13th, 1903. F. W. Marsh, clerk.

Return on Service of Writ.

UNITED STATES OF AMERICA, *Northern District of Florida,* } *ss:*

I hereby certify and return that I served the annexed citation on the therein-named West Coast Naval Stores Co., by handing to and leaving a true and correct copy thereof with Avery & Avery, attorneys of record for the above named corporation, personally at Pensacola, Fla., in said district on the 14th day of Nov., A. D., 1903.

T. F. McGOURIN,
U. S. Marshal,
By H. WOLF,
CH. O., *Deputy.*

And at the same time, and on the same day, there issued out of the circuit court of the United States, bearing the signature and tested by the clerk of the circuit court of the United States for the northern district of Florida, the following writ of error, the original thereof being hereto annexed, and returned herewith, which, together with the return indorsed thereon is hereto attached, to wit

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States for the northern district of Florida, Greeting:

Because in the record and proceedings, as also in the rendi-
22 tion of the judgment of a plea which is in the said circuit court, before you, or some of you, between The West Coast

Naval Stores Company, a corporation, plaintiff, and The Louisville & Nashville Railroad Company, a corporation, defendant, manifest error has happened to the great damage of said plaintiff, The West Coast Naval Stores Company, a corporation, as by its complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be thereing given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States circuit court of appeals for the fifth circuit, together with this writ, so that you have the same at New Orleans, Louisiana, on the ninth day of December, A. D. 1903, in the United States circuit court of appeals, to be then and there held, and the records and proceedings aforesaid being inspected, the said United States circuit court of appeals may cause further to be done therein to correct that error what of right, and according to the laws and customs of the United States should be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States, this 13th day of November, in the year of our Lord, one thousand, nine hundred and three.

[SEAL.] F. W. MARSH,
Clerk of the Circuit Court of the United States for the Northern District of Florida.

(Indorsed:) Louisville & Nashville Railroad Company, pl't'ff in error, *vs.* West Coast Naval Stores Co., def. in error. Writ of error.

The within writ of error served this November 13th, 1903, by lodging and filing a copy for the defendant in the clerk's office of the circuit court of the United States for the northern district of Florida, at Pensacola, Florida.

Witness my hand and seal of office this November 13th, 1903.

[SEAL.] F. W. MARSH, *Clerk.*

23 In the United States Circuit Court of Appeals, Fifth Circuit.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, a Corporation, Plaintiff in Error,
vs.
WEST COAST NAVAL STORES COMPANY, a Corporation, Defendant in Error.

Error to the circuit court of the United States for the northern district of Florida.

The undersigned attorneys for the plaintiff in error and defendant in error agree that there shall be omitted from the record upon

the transcript for the circuit court of appeals in this cause, all the papers and other proceedings therein except the following, to-wit:

1. The præcipe for summons;
2. The summons and return;
3. The declaration;
4. The second count of the declaration;
5. A statement as follows:

"To these counts the defendant filed several pleas, among them a plea numbered three. The plaintiff demurred to the said plea three, the court overruled the demurrer, and final judgment was entered against the plaintiff, whereupon it sued out a writ of error to the circuit court of appeals of the fifth judicial circuit of the United States, at New Orleans, and it was, upon consideration by said court, ordered that the judgment of the said circuit court be reversed and the cause remanded with instructions to sustain the demurrer of the plaintiff to the third plea filed by the defendant, and otherwise to proceed according to law as evidence by the mandate of the said circuit court of appeals filed in the said circuit court on April 30, A. D. 1903. In accordance with said mandate an order was entered sustaining the demurrer to the said plea three, and giving leave to the parties to amend as they might be advised."

Said 3rd plea is as follows:

5½. The third plea of defendant filed March 14, 1902.

6. The plea of the defendant filed November 3, 1903;

24 7. The demurrer of the defendant thereto, filed November 3, 1903;

8. The order of the court sustaining the said demurrer;
9. The præcipe for default;
10. The entry of default;
11. The assessment of damages and verdict of the jury, and judgment;
12. The petition and allowance of appeal;
13. Assignment of errors;
14. Bond for plaintiff in error;
15. Citation;
16. Service and return of citation;
17. Writ of error;
18. Certificate;

W. A. BLOUNT,
Att'y for Plaintiff in Error.
JNO. C. AVERY,
Att'y for Defendant in Error.

Filed December 8th, 1903.

F. W. MARSH, *Clerk.*

Clerk's Certificate.

United States of America, Northern District of Florida.

I, F. W. Marsh, clerk of the circuit court of the United States for the northern district of Florida in the fifth judicial circuit, by virtue of the attached writ of error and in obedience thereto, do hereby certify that the foregoing pages, numbered from one to thirty, inclusive, contain a true and complete transcript of the record and proceedings had in the circuit court of the United States aforesaid, in a cause of West Coast Naval Stores Company against The Louisville & Nashville Railroad Company, and wherein The Louisville & Nashville Railroad Company is plaintiff in error and The West Coast Naval Stores Company is defendant in error, as the same remains of record and on file in said court.

In testimony whereof, I have caused the seal of said court to be hereunto affixed, at the city of Pensacola, in the district aforesaid, this 21st day of November, A. D. 1903.

[SEAL.] F. W. MARSH, *Clerk.*

25 United States Circuit Court of Appeals for the Fifth Circuit.

I, Charles H. Lednum, clerk of the United States circuit court of appeals for the fifth circuit, do hereby certify that the foregoing 24 pages, numbered from 1 to 24, inclusive, contain a true copy of the record and proceedings as filed in this court from the circuit court of the United States for the northern district of Florida, in the case of The Louisville & Nashville Railroad Co., *versus* The West Coast Naval Stores Company, No. 1323, as the same remains upon the files and records of said United States circuit court of appeals.

In testimony whereof, I hereunto subscribe my name and affix the seal of said United States circuit court of appeals, at the city of New Orleans, Louisiana, this 8th day of April, A. D. 1904.

[Seal United States Circuit Court of Appeals, Fifth Circuit.]

CHARLES H. LEDNUM,
Clerk of the United States Circuit Court of Appeals
for the Fifth Circuit.

26 U. S. Circuit Court of Appeals. Filed Mar. 29, 1904. Charles H. Lednum, clerk.

United States Circuit Court of Appeals, Fifth Circuit, November Term, 1903.

LOUISVILLE & NASHVILLE RAILROAD CO.
v.
WEST COAST NAVAL STORES COMPANY. } No. 1323.

Error to the circuit court of the United States for the northern district of Florida.

Before Pardee, McCormick, and Shelby, circuit judges.

By the COURT: The questions involved on this writ of error were fully decided when this case was first before the court; see West Coast Naval Stores Company *v.* Louisville & Nashville R. Co., 121 F. R. 645; and as we adhere to the views therein expressed, the judgment of the circuit court is affirmed.

27 THE LOUISVILLE & NASHVILLE RAILROAD CO.
vs.
THE WEST COAST NAVAL STORES CO. } No. 1323.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the northern district of Florida, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court that the judgment of the said circuit court in this cause be, and the same is hereby, affirmed.

It is further ordered and adjudged that the plaintiff in error, Louisville & Nashville Railroad Company, and the sureties on the writ of error bond herein, F. C. Brent and Wm. H. Knowles, be condemned to pay the costs of this cause in this court, for which execution may be issued out of said circuit court.

March 29, 1904.

28 United States Circuit Court of Appeals for the Fifth Circuit.

I, Charles H. Lednum, clerk of the United States circuit court of appeals for the fifth circuit, do hereby certify that the foregoing one page numbered *from* — *to* —, *inclusive*, contain- a true copy of the opinion of the court and the final judgment, in the case of Louisville & Nashville Railroad Co. *versus* West Coast Naval Stores Company, No. 1323, as the same remains upon the files and records of said United States circuit court of appeals.

In testimony whereof, I hereunto subscribe my name and affix the seal of said United States circuit court of appeals, at the city of New Orleans, Louisiana, this 30th day of March, A. D. 1904.

[Seal United States Circuit Court of Appeals, Fifth Circuit.]

CHARLES H. LEDNUM,
Clerk of the United States Circuit Court of Appeals for the Fifth Circuit.

29 [Endorsed:] Louisville & Nashville Railroad Company *vs.* West Coast Naval Stores Company. No. 1323. Certified copy of proceedings and judgment in the circuit court of appeals for the fifth judicial circuit.

30 In the Supreme Court of the United States.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Plaintiff in Error, *vs.* WEST COAST NAVAL STORES COMPANY, Defendant in Error.	No. 649, October Term, 1903.

We the undersigned attorneys, respectively for the plaintiff in error and the defendant in error, do hereby agree that the transcript of record in this cause in the Supreme Court of the United States, used upon the application for the writ of certiorari, shall be taken as a return to the writ of certiorari granted herein on the 25th day of April, A. D., 1904.

(Signed) W. A. BLOUNT &
A. C. BLOUNT, JR.,
Attorneys for Plaintiff in Error.
JNO. C. AVERY,
Attorney for Defendant in Error.

I, Charles H. Lednum, clerk of the United States circuit court of appeals for the fifth circuit, do hereby certify that the above and foregoing is a full, true, perfect and complete copy of a certain stipulation filed by the parties in relation to the return upon the writ of certiorari issued by the Supreme Court of the United States in the case of The Louisville & Nashville Railroad Company *vs.* West Coast Naval Stores Company, as fully as the same remains on file and of record in my office.

Witness my hand and seal of office, at New Orleans, Louisiana, on this the 7th day of May, A. D., 1904.

[Seal United States Circuit Court of Appeals, Fifth Circuit.]

CHARLES H. LEDNUM,
Clerk of the United States Circuit Court of Appeals for the Fifth Circuit.

31 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the honorable the judges of the United States circuit court of appeals for the fifth circuit, Greeting:

Being informed that there is now pending before you a suit in which The Louisville & Nashville Railroad Company is plaintiff in error and The West Coast Naval Stores Company is defendant in error which suit was removed into the said circuit court of appeals by virtue of a writ of error to the circuit court of the United States for the northern district of Florida, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said circuit court of appeals and

32 removed into the Supreme Court of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 26th day of April, in the year of our Lord one thousand nine hundred and four.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

33 United States Circuit Court of Appeals for the Fifth Circuit.

I, Charles H. Lednum, clerk of said court do hereby certify that I received the within writ on the 7th day of May, A. D., 1904,

And whereas the attorneys for the parties therein named have, by a stipulation in writing filed, in my office on this day, agreed that the transcript of record in this cause in the Supreme Court of the United States used upon the application for the writ of certiorari shall be taken as a return to the writ of certiorari granted herein on the 25th day of April, A. D., 1904,

Therefore, in compliance with said writ, and by direction of the judges of this court, I have made and attach hereto, a certified copy of said stipulation as a return to the within writ.

Witness my official signature and the seal of said office at New Orleans, Louisiana, this 7th day of May, A. D., 1904.

[Seal United States Circuit Court of Appeals, Fifth Circuit.]

CHARLES H. LEDNUM,
Clerk of the U. S. Circuit Court of Appeals for the Fifth Circuit.

[Endorsed:] File No. 19,300. Supreme Court of the United States. No. 225, October term, 1904. The Louisville & Nashville Railroad Co. *vs.* The West Coast Naval Stores Company. Writ of certiorari and return. Filed May 9, 1904.

IN THE SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM 1903.

No.

THE LOUISVILLE & NASHVILLE RAILROAD COMPANY, PETITIONER,

vs

THE WEST COAST NAVAL STORES COMPANY, RESPONDENT.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Judicial Circuit.

TO THE HONORABLE, THE SUPREME COURT OF THE UNITED STATES.

Your Petitioner respectfully shows unto this Honorable Court, as follows:

Statement of Pleading and Proceedings.

On August 30th, 1900, the West Coast Naval Stores Company, respondent hereto, instituted an action in the United States Circuit Court for the Northern District of Florida, sitting at Pensacola, to recover against the petitioner for the cause of action hereinafter stated. The respondent relied upon two counts, the first of which is as follows:

The West Coast Naval Stores Company, a corporation under the laws, and a citizen, of the State of Florida, the plaintiff, by its attorney, John C. Avery, sues the Louisville & Nashville Railroad Company, a corporation under the laws, and a citizen, of the State of Kentucky, the defendant,

For that, to-wit: before the institution of this suit, the defendant was, in the county and state aforesaid, a common carrier of goods, wares and merchandise for hire by means of its cars drawn by locomotives over defendant's railways, and the plaintiff was then and there engaged in buying and selling, and shipping from Pensacola and other points in said county, naval stores, consisting of turpentine and

rosin, in barrels, which plaintiff conveyed to and from its yard, in said county, and warehouse in the City of Pensacola, by means of defendant's cars and locomotives, over defendant's railway, including a switch, constructed by defendants for plaintiff from defendant's main line running into the City of Pensacola, to and into plaintiff's said yard; and the plaintiff in fact avers that the course of business dealing between plaintiff and defendant, then and there, was for plaintiff to transport over said switch and defendant's railway, into the City of Pensacola, by means of defendant's cars and locomotives, plaintiff's turpentine and rosin to and upon defendant's wharf extending into the Bay of Pensacola, which wharf was and is conducted by defendant and used by persons bringing goods over defendant's railway to and into Pensacola, to be shipped from said wharf, and at and upon said wharf to deliver plaintiff's turpentine and rosin to vessels, to be in and by such vessels carried to other ports in the prosecution of plaintiff's business, of which the defendant had notice; and it was the duty of the defendant, as common carrier, as aforesaid, and in the conduct of the wharf, as aforesaid, for a reasonable compensation, which plaintiff was always ready and willing to pay defendant, to give to the plaintiff the facilities aforesaid; and plaintiff further in fact avers that all of the service in fact rendered, as aforesaid, to it by the defendant, was for hire, by the plaintiff to the defendant, paid as and when required; and it was the purpose and intention of the plaintiff thereafter to continue to prosecute its business aforesaid, of which defendant had notice, and in the prosecution thereof to continue to use the facilities aforesaid as defendant well knew paying therefor reasonable and customary hire; and plaintiff had the means and ability, and had made necessary arrangements, for the further prosecution of such business, as the defendant, well knew; and the plaintiff further in fact avers that, in the midst of the prosecution of its said business, which, as plaintiff avers, was a large and lucrative business, the defendant notified plaintiff that it would not carry plaintiff's turpentine and rosin, of which plaintiff then and there had on hand a large and valuable stock, as defendant well knew, and to which it was constantly adding, as defendant well knew, and from thence hitherto has continued to add in the prosecution of its said business, and that it, the said defendant, would refuse, and did refuse, to

transport, and from thence hitherto it has continued to refuse, to transport plaintiff's turpentine and rosin over its said railway to its said wharf, to be there loaded on certain vessels, with the managers of which plaintiff had contracted for the taking thereof from Pensacola to other ports, to which plaintiff intended to ship the same, of which defendant had notice, or to permit the plaintiff to deliver its said turpentine and rosin at said wharf to said vessels, or to permit said wharf or said railway of defendant to be used in the prosecution of plaintiff's business in so far as the same should involve the use of the said vessels in the shipment of plaintiff's said turpentine and rosin from Pensacola; by means whereof plaintiff sustained great loss and damage, to-wit: five thousand dollars ($5,000.00) for the difference between what it would have cost the plaintiff to carry the same to and load it upon the said vessels by means of defendant's railway and wharf, and what it cost to do so by other means of conveyance and delivery; and in the sum of ten thousand dollars ($10,000.00) for what it will cost plaintiff hereafter to make delivery to said vessels in excess of what it would cost to make such delivery by means of defendant's said railway and wharf; and in the sum of ten thousand dollars ($10,000.00) on account of delays, annoyances and embarrassments, resulting from being compelled to carry on its business by transporting its goods in carts drawn by mules and horses for miles by sand roads and streets, and then shipping the same out to said vessels by means of lighters, and the necessary and inevitable general immediate injury to the business of plaintiff by having to carry on its business by such rude and primitive methods side by side with modern modes and facilities, thereby losing prestige in the business community, and being forced to compete with others who have and enjoy unrestricted and unlimited use of defendant's railway and wharf facilities, as aforesaid; the plaintiff is otherwise, by reason of the actings and doings of the defendant aforesaid, greatly damaged in its business.

And plaintiff claims damages in the sum of twenty-five thousand dollars ($25,000.00,) and therefore it sues, &c.

JOHN C. AVERY,
Attorney for Plaintiff.

The second count is not set out here because it is substantially the same as the first and was so treated by the

Circuit Court of Appeals (West Coast Naval Stores Co. vs. Louisville & Nashville R. R. Co., 121 Fed. Rep. 645.) Such second count is, however, found in the Record herewith submitted, on page 5.

To these counts the petitioner interposed several pleas, among them a plea numbered three. This plea is not set out herein because it is substantially the same as a subsequent plea numbered one which is set out hereafter in full. The plea numbered three, however, is to be found in the Record on page eight.

The Circuit Court overruled a demurrer to this plea—three—and final judgment was entered against the respondent, who sued out a writ of error to the Circuit Court of Appeals of the Fifth Judicial Circuit, which decided that the Court below erred in overruling the demurrer to the said plea and reversed and remanded the cause. (West Coast Naval Stores Co. vs. Louisville & Nashville R. R. Co., 121 Fed. Rep. 645.) A copy of the decision is attached hereto as "Appendix A." After the reversal the petitioner withdrew all pleas theretofore filed and filed a new plea numbered one, which is as follows, (Rec. p. 10:)

West Coast Naval Stores Co.
vs.
Louisville & Nashville Railroad Co.

The defendant, withdrawing all former pleas, pleads to the first and second counts of the declaration as follows:

1. That, the defendant has adequate depots and yards in the City of Pensacola for the receipt and delivery of all merchandise committed to it for transportation to, and delivery at, Pensacola. That neither its charter, nor any statutory law has compelled or required, or compels or requires it to construct or maintain the wharf mentioned in the declaration, but that it constructed the same at an expense to it of tens of thousands of dollars, for the purpose of providing facilities for the transaction of its business with such vessels as it might permit to come to and lie at said wharf to take cargo. That no business has ever been done at said wharf except the transportation by the defendant in cars on its railroad over said wharf to and from vessels lying at the said wharf, of goods brought, or to be transported, by said vessels, and the loading and unloading thereat of such vessels. That in accordance with such purpose, it made

and promulgated, upon the construction of said wharf, and more than five years prior to the bringing of this suit, rules and regulations, by which it limited the use of its wharves, including the wharf mentioned in the declaration, "to traffic handled by vessels in regular lines running in connection with the Louisville & Nashville Railroad, and vessels belonging to, or consigned to, Gulf Transit Company" (an agency of defendant), and making the use of said wharves "for traffic in connection with vessels other than herein referred to," "subject to special arrangement." The said rules and regulations were in operation and enforced by defendant from the time of their promulgation, as aforesaid, up to, and at the time of, the refusal of the defendant to permit the naval stores of the plaintiff to be loaded from its wharf into the "certain vessels" mentioned in the declaration, and still are in force and operation. That the said "certain vessels" were not regular lines running in connection with the Louisville & Nashville Railroad, nor were they belonging to, or consigned to, Gulf Transit Company, nor had they made any special arrangements with the defendant for the use of the said wharf, but that said vessels constituted an independent line between New York and Pensacola, and New York and Mobile, Alabama, carrying merchandise between the said points, and would have come in competition with a line of steamers with which the defendant was then negotiating for regular service in the transportation of merchandise to and from New York and Pensacola in connection, and under traffic arrangements, with defendant, and such service has since been established, and a line of steamers is now regularly transporting merchandise between said points in such connection, and under such traffic arrangements; and was also in competition with the defendant itself, which was, at said time, and had been for a long time prior thereto, engaged in a like business between said points, carrying goods by its line of railroad from Pensacola and Mobile to River Junction, Florida, Cincinnati, Ohio, and Montgomery, Alabama, and there delivering the same to a connecting carrier and other carriers connecting therewith, transporting goods to the City of New York, and receiving from said connecting carriers at the points aforesaid, and transporting to Pensacola and Mobile, goods shipped from New York to Pensacola and Mobile.

That the defendant has not either notified plaintiff that it would not carry plaintiff's naval stores, nor refused to transport plaintiff's naval stores over its Railway mentioned in the declaration, to and on its wharf also mentioned in the declaration; that it has at all times so transported them when requested so to do by the plaintiff. That the defendant has refused to permit the certain vessels mentioned in the declaration, to take goods and merchandise from its said wharf to be transported by them to the port of New York, as aforesaid, but that such refusal was solely because the said vessels were not of either of the classes provided for by the rules aforesaid, nor had made special arrangements with the defendant, and would have been, as aforesaid, in competition with the lines of vessels connecting with the defendant running to and from New York, and was, as aforesaid, in competition with the defendant, itself, in its rail transportation aforesaid, to and from New York City, and that the defendant was then, and at all times had been, ready and willing to give, and did give, to the plaintiff, the same facilities for shipping naval stores to New York or any other port, over defendant's said wharf, as it gave to any and all other shippers; That the unloading by the plaintiff of its said goods into said vessels necessarily involves the lying at, attachment to, and use of the said wharf, one of the terminals of the defendant, by the said vessels; That the said wharf was not at the time mentioned in the declaration, and has never been, a public wharf, unless the facts set forth hereinbefore in this plea constituted it such.

W. A. BLOUNT,
Attorney for Defendant.

The Court sustained a demurrer to this plea and the petitioner declining to plead further, default and judgment were entered against it (p. 16 Rec.) and it sued out a writ of error to the Circuit Court of Appeals of the Fifth Judicial Circuit, which affirmed the judgment of the Court below. (See opinion Appendix B hereto.)

Grounds of this Petition.

1. That the Circuit Court of Appeals erred in the judgment against the petitioner.

2. That special reasons exist, in accordance with the decisions of this Court, why a writ of certiorari should be granted to review that erroneous judgment.

I.

The Court Below Erred.

We, of course, submit a brief herewith, in which we attempt to demonstrate the Court's error. It is only necessary, therefore, for completeness, that we state the questions at issue and the contentions of the Court below and of the petitioner.

The plea which the Court below pronounced bad presents, in connection with the count to which it is pleaded, the important question, whether a railroad company which has provided ample facilities for the delivery by it of all freight committed to it for transportation to and delivery at a city on the sea board, can, when not compelled by statute or charter, construct a wharf, place tracks thereon, connect them with its tracks leading thereto, and transport freight from such tracks to and upon said wharf for all persons alike, and still have the right to permit to come to such wharf, for the purpose of removing such freight, only such vessels as may run in regular lines in connection with it, or such as may come under special arrangements with it, and to refuse such wharf facilities to vessels which would come in competition with it, or with lines of steamers running in connection with it.

The petitioner affirms this right and the Court below denied it.

Stated a little differently, the questions were:

Whether the petitioner was, under the circumstances set out in the plea, a common carrier as to its wharf, and,

Whether one common carrier has, independent of charter or contract, the right to use the terminals of another carrier, and,

Whether a *competing* common carrier has, independent of statute or contract, the right to use the terminals of another carrier, and

Whether one common carrier has, independent of statute or contract, a right to use the wharf of another carrier.

The Circuit Court of Appeals rests its decision upon the idea that the petitioner is a common carrier, that as such it must serve all alike, that its wharf is the wharf of a common carrier and, thus, a public wharf to which all vessels have the right of access to receive freight transported by petitioner, and that it is a violation of such right to refuse to

allow vessels selected by a shipper to come to the wharf to receive freight.

These questions, as we think we shall show in our brief, were decided erroneously by the Circuit Court of Appeals.

2.

Special Grounds for this Petition.

First:

The decision of the Circuit Court of Appeals is in conflict with the decisions of this Court in cases analogous in the facts and identical in principle.

As we understand the doctrine of this Court, in its decisions, a common carrier can refuse to make traffic connections with other carriers; can "select his own agencies" for carrying out his contracts of carriage, can decline to permit the use of its terminals to other carriers, and, no matter what may be its duties to the public generally, can refuse to afford equal facilities to all other common carriers.

A. T. & S. F. R. R. Co. vs. Denver & N. O. &c., 110 U. S. 607;

Express Cases, U. S. 124;

C. St. L. & N. O. Ry. Co. vs. Pullman Car Co. 139 U. S. 79;

Tex. & Pac. Ry. Co. vs. Interstate Commerce Commission, 162 U. S. 197.

We think that we demonstrate in our brief the violation, by the Circuit Court of Appeals, of the principles embodied in these cases.

Second:

The decision of the Court below is contrary to the decisions of other U. S. Circuit Courts of Appeals and U. S. Circuit Courts in other circuits,

which announce and apply the principles enunciated in the decisions of this Court.

(C. C. A. 8th Circuit)—Little Rock &c. vs. St. Louis &c. Ry. Co. 61 Fed. 775–781;

(C. C. A. 9th Ct.)—Ilwaca Navigation Co. vs. Oregon Short Line &c. 57 Fed. 673;

Justice Jackson—Ky. & I. Bridge Co. vs L. & N. R. R. Co. 37 Fed. 567–628;
Justice Field—Oregon Short Line vs. Northern Pac. R. R. Co. 51 Fed. 465—475;
Judge Williams—Little Rock & M. R. R. Co. vs. St. Louis &c. 59 Fed. 404;
Judge Phillips—St. Louis Drayage Co. vs. L. & N. R. R. Co. 65 Fed. 39.

We think, also, that our brief demonstrates the inconsistency of the holding of the Court below with these cases.

Third:

The decision of the Court below was also in conflict with the decisions of the English Courts and the highest State Courts of Appeal

of this country, in that it ignored the right of a carrier, in the absence of statute or charter requirements, to assume the obligations of a common carrier as to such commodities and such businesses as it may see fit, and to discriminate between other common carriers in the use of its terminal facilities. The authorities are too numerous to set forth here, but many of them are to be found in our brief.

Fourth:

The question involved is of national importance

in the sense that it vitally concerns the largest businesses in the country and in every section of the union. Not only does the general question, as to the control by railroad companies of their terminals, affect such companies, but the specific question, as to the control by such companies of their wharves projecting into navigable waters is of the greatest moment not only to them, but to the business public. Such wharves exist upon the shores of the Oceans, the Gulf, the lakes and the large rivers of the country and burdens upon their free use by a railroad carrier, according to the necessities of its business, is harmful in the highest degree both to the carrier and to the shipper over its line. Unless the carrier can reserve its wharf for the connecting carriers selected by it, the certainty and regularity of the shipment of cargoes is destroyed, the inducement to inaugurate and maintain lines of vessels conveying shipments is absent, and that large commerce of the country which is

dependent upon the use of wharves, languishes and dies. The necessity for freedom to the carrier of determination as to what vessels or lines of vessels shall use its wharves is considered at length in our brief.

Fifth:

The question involved is of international importance

in the sense that all the foreign export and import business of the country is done from wharves. If the effect of compelling a railroad carrier to permit the use of its wharf terminals by any vessel desiring to use them, will be to hamper, delay and render more expensive and hazardous the shipment and receipt of goods, and to hinder or prevent the establishment and maintenance of regular lines for the transportation of such goods, foreign commerce will obviously be very greatly injured.

* * * * * * * *

Wherefore, in view of the premises, and as the jurisdiction of this cause vested in the Circuit Court only by reason of the difference of citizenship between the plaintiff and defendant, and as, therefore, the decision of the Circuit Court of Appeals is final except as the statute permits this Honorable Court to review the same by certiorari, petitioner prays that this Court will grant its writ of certiorari directed to the Circuit Court of Appeals for the Fifth Judicial Circuit, requiring that the record of said cause in said Court be certified to this Court and that this Honorable Court will, thereupon, proceed to correct the errors complained of and reverse the said judgment of the Circuit Court of Appeals and of the Circuit Court as of right of law should be done.

WILLIAM A. BLOUNT,
Attorney for Petitioner.

EXHIBIT A.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PARDEE, Circuit Judge (after stating the facts as above). The case shows that the Louisville & Nashville Railroad Company is in the possession of a large wharf, built at its own expense on the extension of a public street in the city of Pensacola into the deep waters of the harbor of the city, on which street and wharf it has laid railroad tracks connecting with its main line and depot in the city, over which tracks the railroad company carries and transports goods ordered and intended for shipment by water, making a quasi terminal of said wharf; and the question is whether this wharf is a public wharf, or, if not public, but a private wharf, is it so located and used that the public has a right to have goods intended for shipment by water beyond Pensacola carried to said wharf, and have ships moored at said wharf, and there take on its said goods?

"Piers or landing places, and even wharves, may be private, or they may be in their nature public, although the property may be in an individual owner, or, in other words, the owner may have the right to the exclusive enjoyment of the structure, and to exclude all other persons from its use, or he may be under obligation to concede to others the privilege of landing their goods or of mooring their vessels there upon the payment of a reasonable compensation as wharfage; and whether they are the one or the other may depend, in case of dispute, upon several considerations, involving the purpose for which they were built, the uses to which they have been applied, the place where located, and the nature and character of the structure." Dutton v. Strong, 1 Black, 23, 32, 17 L. Ed. 29.

In the same case it is held that riparian proprietors have a right to erect bridge piers and landing places on the shores of navigable rivers, lakes, bays, and arms of the sea, if they conform to the regulations of the state, and do not obstruct the paramount right of navigation, but the right to make such erections terminates at the point of navigability. And of such improvements it is said that the riparian proprietor may construct any one of them for his own exclusive use and benefit; and, if not located in a harbor or other usual resting place for vessels, and if found within a shore of the

sea or the unnavigable waters of the lake which has not been used, or held out as intended to be used, by others, the public have no right to make use of the same.

The structure in this case is located in deep water, in a harbor where many ships lie at all seasons of the year; it was built, as shown by the plea, for the purpose of providing facilities for the transaction of such business as the railroad company might desire with such vessels as it might permit to come and lie by said wharf to take cargo; and it limits the use of the wharf to traffic handled by vessels in the regular lines running in connection with the Louisville & Nashville Railroad, and vessels belonging to or consigned to the Gulf Transit Company (an agency of the railroad), and to traffic in connection with other vessels subject to special arrangement; in short, the use of the wharf is limited by the railroad company to vessels of connecting lines, and to such others as the company sees fit to permit.

In Indian River Steamboat Company v. East Coast Transportation Company, 28 Fla. 387, 10 South, 480, 29 Am. St. Rep. 258, where was involved questions very similar to those herein, the Supreme Court of Florida held:

"A railroad corporation, under the laws of Florida, has the right to erect and maintain docks, wharves, and piers, as incidents to its business, and to hold or dispose of them as may be deemed proper; but such corporation engaged in the business of common carrier has no right to lease the terminal point of its railroad track and terminal facility on a navigable stream to a steamboat company, and thereby defeat the ingress and egress to and from said railroad track on the part of other competing lines of steamboat companies."

And in the opinion said:

"The real question presented here is, can complainant corporation, engaged in carrying freight and passengers on the Indian river by means of steamboats, rent from a railroad common carrier its dock on said river on which its track and terminal facilities are located, and exclude others from landing at said terminal point for the purpose of delivering and receiving freight and passengers to and from said common carrier? This question, we think, must be answered in the negative. If it be competent to sustain such a contract, the common carrier can select one connecting line of boats, and exclude all others from doing busi-

ness with it. Such a doctrine would lead to the legalizing of a monopoly, and the sanction of an unfair and unjust preference between connecting and competing lines of transportation. We do not understand that a common carrier ever had such power as this."

In Barrington v. Commercial Dock Company (Wash.) 45 Pac. 748, 33 L. R. A. 116, the right of a owner of a wharf located on the shore of Commencement Bay, in the city of Tacoma, where the water at the outer edge of the wharf was of the depth of eight feet low tide—the same situated on a waterway approachable from the sea and the waters of Puget Sound—and where certain vessels approved by the owner of the wharf, competing in business with other vessels, were permitted to land, to exclude certain other vessels in the same competing business, not approved by the wharf owner, was much considered, and the court said:

"The main contention of appellant is that its wharf is a private wharf, and under the control of the owner, and that it has a right to determine for itself with whom it will do business; and counsel confidently cites section 2136, Hill's Ann. St. & Codes, in support of this position. * * * The section, as a whole, while it recognizes the right of private ownership in wharfs, cannot be construed to mean that such private property may not be devoted to such use as will, in contemplation of law, make it partake of the nature of a public wharf. Upon this question it was said by the Supreme Court of the United States in Dutton v. Strong, 66 U. S. 32, 17 L. Ed. 32, that 'piers of landing places, and even wharves, may be private, or they may be in their nature public, although the property may be in an individual owner, or, in other words, the owner may have the right to the exclusive enjoyment of the structure, and to exclude all other persons from its use, or he may be under obligation to concede to others the privilege of landing their goods or of mooring their vessels there upon the payment of a reasonable compensation as wharfage; and whether they are the one or the other may depend, in case of dispute, upon several considerations, involving the purpose for which they were built, the uses to which they have been applied, the place where located, and the nature and character of the structure.' In Gould, Waters, § 119, the author lays down the proposition, and supports it by a great array of authorities, that, 'when wharves belonging to individuals

are legally thrown open to the use of the public, they become affected wth a public interest, and the wharfage must be reasonable.' The proof in this case shows that numerous steamers landed at appellant's wharf daily, discharging passengers and baggage, as well as freight, from different ports in the waters of Puget Sound and elsewhere; and it also shows that the appellant receives the sum of 25 cents per ton for every ton of freight going out or coming in over said wharf. We think that the language of the court in Munn v. Illinois, 94 U. S. 113, 24 L. Ed. 77, is applicable here, viz., that appellant stands 'in the very "gateway of commerce," and takes toll from all who pass.' In The Kate Tremaine, 5 Ben. 60, Fed. Cas. No. 7,622, it is said: 'A wharf is a necessity of modern navigation, and of navigation alone. The sole object of its erection is to facilitate the transportation of passengers and freight upon navigable waters. * * * Every vessel has a license to use, for her safety or convenience, any public wharf on navigable waters, upon paying reasonable wharfage.' We think that, in determining the character of appellant's wharf, regard should be had to the use to which it has been devoted, rather than its private ownership, and that, upon the facts found, the position of the appellant cannot be maintained. As well might the proprietor of a stagecoach claim the right to discriminate upon the ground that the property employed in his business was private property. The doctrine, if maintained, would tend to promote and further monopolies, which is not the policy of our law to favor."

The foregoing well-considered cases seem to furnish sufficient authority for holding that a wharf built out into the deep waters of a harbor like that of Pensacola, where ships coming from and going to all parts, land, lie, moor, and anchor for rest and loading and unloading, and which is used by the owner for his own business, and for such ships of others engaged in competing business as the owner may see fit to permit, is, by its location and use, open to all ships whose traffic calls them to take goods therefrom.

When the case goes further, and we consider that, in addition, the wharf is a quasi railroad terminal, where all goods, as ordered, are carried, and to which all consignees of goods ought to have access, the reasons are decidedly more potent for holding that such wharf, located in public waters which are free to all, is affected with a public use,

and cannot lawfully be farmed out to a small portion of the shipping public, to the encouragement of a monopoly and the hinderance of competition. And the monoply in the instant case at the wharf is not the only resulting evil. Controlling the wharf, as it claims the right to do, gives the railroad company the entire control at nearly all points on its line as to shipment of goods destined to water transportation beyond Pensacola, both as to route and rates.

The learned counsel for defendant in error has briefed a very plausible argument in favor of the right of the railroad company to discriminate against shippers and competing vessels for business at the wharf in question, and in favor of such competing vessels as it sees fit to permit, and, with much industry, has collated numerous authorities on the propositions submitted by him. On the proposition that a common carrier may hold itself out to the public as willing to serve it, and every member of it, just as far as it pleases, and its liability will be coextensive with such holding out, he cites Dickson v. Great Nothern Railway Co., L. R. 18 Q. B. Div. 176; Johnson v. Midland Railway Co., 4 Ex. 367; Hosea v. McCrory, 12 Ala. 349; Whitemore v. Steamboat Caroline, 20 Mo. 513; Lake Shore, etc., v. Perkins, 25 Mich. 329, 12 Am. Rep. 275. That a common carrier may devote portions of its facilities to its own use, or to the use of particular individuals, and thus refuse to be a common carrier as to those facilities: People v Railway Co,, 57 Ill. 437, and Citizens' Bank v. Nantucket Steamboat Co., 2 Story, 16, Fed. Cas. No. 2,730; Hutch. on Carriers, 75. Counsel also announces the proposition that one common carrier has no right, independent of charter or contract, to use the terminals of another carrier; citing Atchison, T. & S. F. R. Co. v. Denver & N. O. R. R., 110 U. S. 667, 4 Sup. Ct. 185, 28 L. Ed. 291; Gulf, Colorado & S. F. Ry. v. Miami Steamship Co., 30 C. C. A. 142, 86 Fed. 407, 416, 422; Little Rock & Memphis R. Co. v. St. Louis Ry. Co., 11 C. C. A. 417, 63 Fed. 775, 781; Little Rock & Memphis R. Co. v. St. Louis, I. M. & S. Ry. Co. (C. C.) 59 Fed. 404. Again, that a transportation company operating a railway and a line of steamboats connecting it at the company's wharf is not required by the third section of the interstate commerce act of February 4, 1887, 24 Stat. 380 [U. S. Comp. St. 1901, p. 3155,] to permit the boats of a competitor to land at such wharf: Ilwaca Ry. & Navigation Co. v. Oregon Short Line,

etc., 6 C. C. A. 495, 57 Fed. 673. Counsel also cites cases to numerous to mention as to the proposition that a railway company has a right to discriminate between draymen, hackmen, etc., desiring to use depot and like facilities of the railroad. These authorities are said to be collected in Donovan v. Pennsylvania Co. (C. C. A.) 120 Fed. 215. None of these propositions are, in our opinion, applicable to the present case, and the only one of the adjudged cases cited which seems to bear upon propositions here involved is Ilwaca Railway Co. v. Oregon Short Line, etc., supra. An examination of that case shows that the Oregon Short Line & Navigation Company controlled both the railway and the steamship line connecting with the wharf in question, and we find nothing decided therein to conflict with our views of the present case. If the wharf involved in this case, although in the deep waters of a navigable harbor, was used by the railroad company solely for its own carrying business in connection with its own lines, a different case would be presented; and we have herein quoted from Indian River v. East Coast Trans. Co., supra, to that effect.

As we hold to the views herein expressed, we are called on to reverse the judgment of the Circuit Court and remand the case, with instructions to sustain the demurrer to the third plea, and otherwise proceed according to law. And it is so ordered.

APPENDIX B.

U. S. CIRCUIT COURT COURT OF APPEALS.
FILED MARCH 29, 1904.

CHARLES H. LEDNUM,
Clerk.

UNITED STATES CIRCUIT COURT OF APPEALS.
FIFTH CIRCUIT.

NOVEMBER TERM 1903.

No. 1323

THE LOUISVILLE & NASHVILLE RAILROAD COMPANY,

vs

THE WEST COAST NAVAL STORES COMPANY.

Error to the Circuit Court of the United States for the Northern District of Florida.

Before PARDEE, McCORMICK and SHELBY, Circuit Judges.

By the Court.

The questions involved on this writ of error were fully decided when this case was first before the court: see West Coast Naval Stores Company vs. Louisville & Nashville R. R. Co., 121 F. R. 645; and as we adhere to the views therein expressed, the judgment of the Circuit Court is AFFIRMED.

THE LOUISVILLE & NASHVILLE RAILROAD CO.

vs.

THE WEST COAST NAVAL STORES CO.

No. 1323.

This cause came on to be heard on the Transcript of the Record from the Circuit Court of the United States for the Northern District of Florida, and was argued by counsel.

On Consideration Whereof, It is now here ordered and adjudged by this court that the judgment of the said Circuit Court in this cause be, and the same is hereby, affirmed.

It is further ordered and adjudged that the plaintiff in error, Louisville & Nashville Railroad Company, and the sureties on the writ of error bond herein, F. C. Brent and Wm. H. Knowles, be condemned to pay the costs of this cause in this court, for which execution may be issued out of said Circuit Court.

March 29, 1904.

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE FIFTH CIRCUIT.

I, CHARLES H. LEDNUM, Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, do hereby certify that the foregoing one page numbered from to , inclusive, contain a true copy of the opinion of the court and the final judgment, in the case of Louisville & Nashville Railroad Co., vs. West Coast Naval Stores Company, as the same remains upon the files and records of said United States Circuit Court of Appeals.

IN TESTIMONY WHEREOF, I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals, at the City of New Orleans, Louisiana, this 30th day of March, A. D. 1904.

[SEAL.]

CHARLES H. LEDNUM,

Clerk of the United States Circuit Court of Appeals for the Fifth Circuit.

STATE OF FLORIDA,
COUNTY OF ESCAMBIA.

Wm. A. Blount being duly sworn says he is the counsel for the Louisville & Nashville Railroad Company, the petitioner; that he prepared the foregoing petition and that the allegations thereof are true, as he verily believes.

W. A. BLOUNT.

Sworn to and subscribed before me this 4th day of April, A. D., 1904.

E. H. ROSENSTEIN,
Notary Public.

[SEAL.]

My commission expires 8, 17, 1907.

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1903.

L. & N. RAILROAD COMPANY, PETITIONER

vs.

WEST COAST NAVAL STORES COMPANY, RESPONDENT.

The respondent, the WEST COAST NAVAL STORES CO., is hereby notified that on Monday, the 18th day of April, A. D. 1904, during the motion hour of the Supreme Court of the United States, the petitioner, the L. & N. Railroad Company, will present to the said Court, in its court room, at the Capitol, in the City of Washington, D. C., a petition that it cause to be issued a writ of certiorari to the Circuit Court of Appeals, for the Fifth Judicial Circuit, requiring the said Circuit Court of Appeals to send up the record of the judgment in said cause, rendered March 29, A. D. 1904, in order that the same may be reviewed by the Supreme Court, in accordance with the law in such cases made and provided.

W. A. BLOUNT,
Attorney for Petitioner.

To J. C. Avery, Esq., Attorney for Respondent.

A copy hereof received this April 4, 1904.

JNO. C. AVERY,
Attorney for Respondent.

FILE COPY.

Supreme Court
FILED
APR 16 190
JAMES H. MCKEN

IN THE SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM 1903.

No. 1049 225.

THE LOUISVILLE & NASHVILLE RAILROAD COMPANY, PETITIONER,

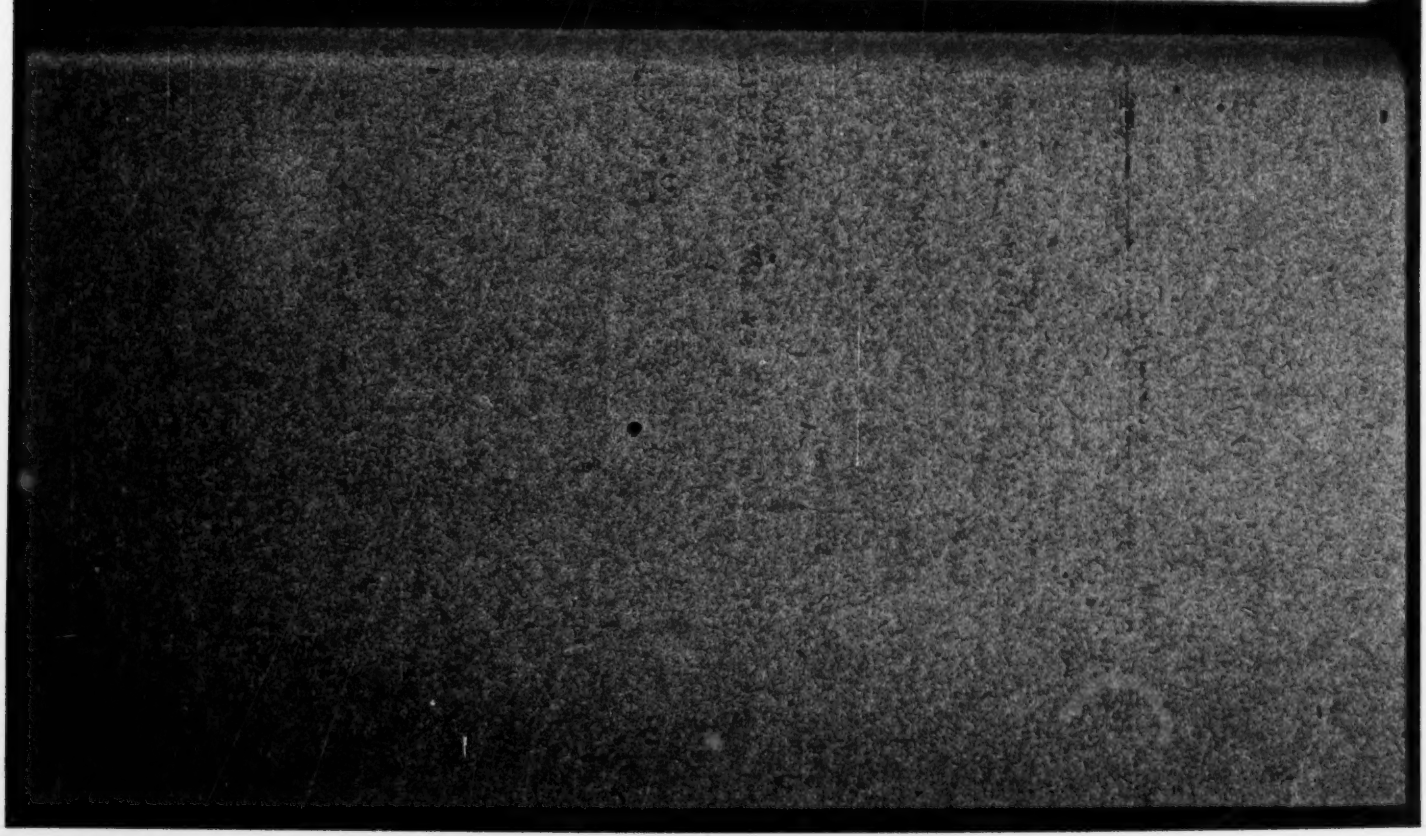
vs

THE WEST COAST NAVAL STORES COMPANY, RESPONDENT.

On Petition of The Louisville & Nashville Railroad Company for Writ of Certiorari to the Circuit Court of Appeals of the Fifth Judicial Circuit.

Brief of WILLIAM A. BLOUNT and A. C. BLOUNT, JR., Attorneys for Petitioner.

W. A. WEEKS, PRINTER, PENSACOLA.



IN THE SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM 1903.

No.

THE LOUISVILLE & NASHVILLE RAILROAD COMPANY, PETITIONER,

vs

THE WEST COAST NAVAL STORES COMPANY, RESPONDENT.

On Petition of The Louisville & Nashville Railroad Company for Writ of Certiorari to the Circuit Court of Appeals of the Fifth Judicial Circuit.

Brief of WILLIAM A. BLOUNT and A. C. BLOUNT, JR.,
Attorneys for Petitioner.

We shall throughout this brief call the petitioner defendant, and the respondent, plaintiff, the position occupied by them respectively in the Circuit Court.

The plaintiff sued the defendant in the Circuit Court of the Northern District of Florida; the Court sustained the demurrer to the only plea filed by the defendant; the defendant declined to plead further and judgment was entered against it; it sued out writ of error to the Circuit Court of Appeals of the Fifth Judicial Circuit, which affirmed the decision of the Circuit Court and the defendant petitioned for this writ of certiorari to review and reverse that judgment.

The petition and the record herewith submitted are short and both contain copies of the declaration and plea, so that it is not necessary to repeat them all here, though we will hereafter set forth the plea. They will be found at pages three *et seq.* and ten *et seq.* of the record, and pages one *et seq.* and four of the petition, respectively.

The substance of the declaration is that the defendant was a railroad and common carrier of goods, and the owner of a wharf extending into the Bay of Pensacola, which wharf was used by defendant to convey goods from its railway, connecting therewith, to vessels lying thereat; that the plaintiff had been accustomed to so having its goods transported, for hire, for it over the said wharf to such vessels, but that before the suit the defendant refused to transport over its wharf the goods of plaintiff to be loaded on certain vessels, with the managers of which the plaintiff had contracted for the taking of such goods from said wharf to other ports to which the plaintiff intended to ship them, or to permit the plaintiff to use the said wharf so far as it involved the use of the said vessels in the shipment of plaintiff's goods.

The plea is best set forth verbatim, since the demurrer to it was sustained.

In the United States Circuit Court, Northern District of Florida.

West Coast Naval Stores Co.

vs.

Louisville & Nashville Railroad Co.

The defendant, withdrawing all former pleas, pleads to the first and second counts of the declaration as follows:

1. That, the defendant has adequate depots and yards in the City of Pensacola for the receipt and delivery of all merchandise committed to it for transportation to, and delivery at, Pensacola. That neither its charter, nor any statutory law has compelled or required, or compels or requires it to construct or maintain the wharf mentioned in the declaration, but that it constructed the same at an expense to it of tens of thousands of dollars, for the purpose of providing facilities for the transaction of its business with such vessels as it might permit to come to and lie at said wharf to take cargo. That no business has ever been done at said wharf except the transportation by the defendant in cars on its railroad over said wharf to and from vessels lying at the said wharf, of goods brought, or to be transported, by said vessels, and the loading and unloading thereat of such vessels. That in accordance with such purpose, it made and promulgated, upon the construction of

said wharf, and more than five years prior to the bringing of this suit, rules and regulations, by which it limited the use of its wharves, including the wharf mentioned in the declaration, "to traffic handled by vessels in regular lines running in connection with the Louisville & Nashville Railroad, and vessels belonging to, or consigned to, Gulf Transit Company" (an agency of defendant), and making the use of said wharves "for traffic in connection with vessels other than herein referred to," "subject to special arrangement." The said rules and regulations were in operation and enforced by defendant from the time of their promulgation, as aforesaid, up to, and at the time of, the refusal of the defendant to permit the naval stores of the plaintiff to be loaded from its wharf into the "certain vessels" mentioned in the declaration, and still are in force and operation. That the said "certain vessels" were not regular lines running in connection with the Louisville & Nashville Railroad, nor were they belonging to, or consigned to, Gulf Transit Company, nor had they made any special arrangements with the defendant for the use of the said wharf, but that said vessels constituted an independent line between New York and Pensacola, and New York and Mobile, Alabama, carrying merchandise between the said points, and would have come in competition with a line of steamers with which the defendant was then negotiating for regular service in the transportation of merchandise to and from New York and Pensacola in connection, and under traffic arrangements, with defendant, and such service has since been established, and a line of steamers is now regularly transporting merchandise between said points in such connection, and under such traffic arrangements; and was also in competition with the defendant itself, which was, at said time, and had been for a long time prior thereto, engaged in a like business between said points, carrying goods by its line of railroad from Pensacola and Mobile to River Junction, Florida, Cincinnati, Ohio, and Montgomery, Alabama, and there delivering the same to a connecting carrier and other carriers connecting therewith, transporting goods to the City of New York, and receiving from said connecting carriers at the points aforesaid, and transporting to Pensacola and Mobile, goods shipped from New York to Pensacola and Mobile.

That the defendant has not either notified plaintiff that

it would not carry plaintiff's naval stores, nor refused to transport plaintiff's naval stores over its Railway mentioned in the declaration, to and on its wharf also mentioned in the declaration; that it has at all times so transported them when requested so to do by the plaintiff. That the defendant has refused to permit the certain vessels mentionod in the declaration, to take goods and merchandise from its said wharf to be transported by them to the port of New York, as aforesaid, but that such refusal was solely because the said vessels were not of either of the classes provided for by the rules aforesaid, nor had made special arrangements with the defendant, and would have been, as aforesaid, in competition with the lines of vessels connecting with the defendant running to and from New York, and was, as aforesaid, in competition with the defendant, itself, in its rail transportation aforesaid, to and from New York City, and that the defendant was then, and at all times had been, ready and willing to give, and did give, to the plaintiff, the same facilities for shipping naval stores to New York or any other port, over defendant's said wharf, as it gave to any and all other shippers; That the unloading by the plaintiff of its said goods into said vessels necessarily involves the lying at, attachment to, and use of the said wharf, one of the terminals of the defendant, by the said vessels; That the said wharf was not at the time mentioned in the declaration, and has never been, a public wharf, unless the facts set forth hereinbefore in this plea constituted it such.

W. A. BLOUNT,
Attorney for Defendant

In our petition we have alleged that the decision of the Court below was erroneous and that there are special grounds in this case why this Court should review the decision and determine upon the sufficiency of the plea. We present the questions embraced in this allegation consecutively:

The Decision of the Court Below was Erroneous

We assume that this Court will examine the question of error only to the extent necessary to convince itself that the decision was not manifestly correct, but if it have doubt on the subject it will not solve that doubt upon the appli-

cation for this writ, but if the importance of the question, or any of the other reasons which under its decisions influence this Court in granting the writ, appear, it will postpone the solution of the doubt until the hearing of the case upon the return of the writ of certiorari.

This plea, in connection with the counts to which it is an answer, presents the important question whether a railroad company which has provided ample facilities for the delivery by it of all freight committed to it for transportation to, and delivery at, a city on the seaboard, can, when not compelled by statute or charter, construct a wharf, place tracks thereon, connect them with its tracks leading thereto, and transport freight over such track for all persons alike and have the right to permit to come to such wharf, for the purpose of removing such freight, only such vessels as may run in regular lines in connection with it, or such as may come under special arrangements with it, and to refuse such wharf facilities to vessels which would come in competition with it, or with lines of steamers running in connection with it.

We affirm this right and the plaintiff in error denies it.

The plaintiff in error rests its proposition upon the idea that the defendant is a common carrier; that as such, it must serve all alike; that its wharf was the wharf of a common carrier, and thus a public wharf, to which all vessels had a right of access to receive freight transported by defendant, and that it is a violation of such right to refuse to allow vessels selected by plaintiff in error to come to the wharf to receive freight.

The plaintiff's right, then, depends upon the right of vessels sought to be employed by it, for it is obvious that if they have no right to come, it has no right to demand that they come.

We rest our contention that the defendant has the right in dispute, upon the following propositions:

1. That the defendant is not, under the circumstances stated in the plea, a common carrier as to its wharf.
2. That one common carrier has not, independent of statute or contract, the right to use the terminals or like facilities of another carrier.
3. That this is peculiarly true as to another competing carrier.
4. And is specially applicable to wharf facilities.

The defendant is not, under the circumstances stated in the plea, a common carrier as to its wharf.

The plea, in connection with the declaration shows that the defendant is a common carrier as to freight brought to Pensacola for delivery at that point. There is nothing to show that it is a common carrier as to its wharf, or that such wharf is public.

As we understand the law, no corporation can be held as a common carrier as to any particular commodity, or any particular portion of its line or facilities, unless the obligation be imposed by its charter or by uniform usage attaching itself to like corporations, or by the holding of itself out as such carrier. If there be no charter obligation or if the usage with such corporations be not so fixed as to necessarily imply an assumption of such obligation by the acceptance of the charter, then the only way in which the many onerous obligations of the common carrier can be imposed is by the voluntary assumption of them by a holding out.

The plea expressly denies that there was any charter obligation to construct a wharf, and hence to devote it to the public.

There is no allegation that railroad companies building wharves at their termini usually throw them open to the public for use.

Then, the only resort of the plaintiff in error must be to the doctrine advanced by it in the Court below, that by the construction of the wharf and by the defendant's permission to certain vessels to use it upon certain terms and for certain purposes, a duty was imposed to permit all vessels to use it upon like terms and for like purposes.

This is tantamount to an assertion that if the defendant serves some at its wharf, it must serve all others in the same way; that is, impose upon itself the duties of a common carrier as to its wharf.

This ignores, however, the law that, independent of the statute or custom, the duty is measured by the extent of voluntary assumption; that is, that a corporation can hold itself out to the public as willing to serve it and every member of it just as far as it pleases, and its liability will be coextensive with such holding out. Thus: A railroad com-

pany may restrict itself to carrying passengers, as in the case of inter-urban trolley lines;

May decline to carry dogs:

Dickson vs. Great Northern Ry., L. R., 18 Q. B., 176.

Or coals:

Oxlade vs. N. E. R. R. Co., (No. 2,) 1 Nev. & Mac., 162: 15 C. B., N. S. 680;

Johnson vs. Midland Ry. Co., 4 Exc. (Welsby, Hurlstone & Gordon,) 367.

Or money:

Hosea vs. McCrory, 12 Ala., 349;

Whitmore vs. Steamboat "Caroline," 20 Mo., 513.

Or cattle:

Lake Shore, &c. vs. Perkins, 25 Mich., 329.

Or any other article of transportation which may be sufficiently differentiated from articles actually carried by it as to be reasonably put into a distinct class.

So, it may devote portions of its facilities to its own use, or to the use of particular individuals, and thus refuse to be a common carrier as to those facilities. The mere fact that they belong to it or are used by it in connection with transportation does not subject them to the common use of the public.

Its offices, side tracks, etc., are of the first class, and its turn-outs to private manufacturing enterprises on its lines are of the second class. It is clear that because they are used as the incidents of general transportation, or as media of transportation to one person, they are not thus subject to the use of the public. In fact, the existence of the facility for one person does not compel the furnishing of a like facility to another; that is to say, because one industry has a side track, another like industry cannot require the same facility.

People vs. Spruance, 57 Ill., 437.

These principles are applicable to the case at bar. The wharf was built without statutory compulsion, and without the existence of any duty to the public, and the defendant had a right to impress upon it such character as it saw fit; either to devote it to the public or to reserve it for its own private use, or to offer its facilities to such persons as it might select, upon such considerations as seemed to it best. It chose the latter course, and the public cannot complain,

for the choice lay with the defendant, and not with the public.

The question as to what imposes the obligations of a common carrier upon a corporation or person, has of course arisen most frequently in cases of tender of merchandise to be carried or of the failure of the carrier to carry safely after receipt, and a reference to the language of some of these cases will be instructive.

Justice Story says:

"The nature and extent of the employment or business which is authorized by the owners, on their own account and at their own risk, and which, either expressly or impliedly, they hold themselves out as undertaking, furnish the true limits of their rights, obligations, duties and liabilities. The question, therefore, in all cases of this sort, is, What are the true nature and extent of the employment and business in which the owners hold themselves out to the public as engaged?"

Citizens' Bank vs. Nantucket S. B. Co, 2 Story, 33.

Lindley, L. J. says:

"At common law no person is bound as a common carrier to carry any goods of a kind which he does not profess to carry. Unless he professes to carry dogs for people in general, he is not bound to carry a dog for any particular individual; and if a carrier says he will not carry dogs except on certain terms, he can lawfully refuse to carry any particular dog on any other terms. In this case the defendants expressly say they are not common carriers of dogs and will not carry dogs except on their own terms. The common law, therefore, does not oblige the company to carry dogs at all; and at common law no action will lie against the company for refusing to carry a dog. Moreover, as no person is bound to enter into an agreement with one person simply because he is in the habit of entering into similar agreements with others, a company which is not a common carrier of dogs, but which may be in the habit of carrying dogs on certain terms, may at common law decline to accept any particular dog, even on these terms, and may refuse to carry the dog at all, or may refuse to carry it except upon some other terms which the company may specify."

Dickson vs. Great Nor. Ry. Co. 18 Q. B. D., 183, 184.

Lopez, J., says:

"Generally railway companies like other carriers were common carriers of goods which they were bound by statute to carry, or which they professed to carry, or actually carried, for persons generally, but not of goods which they did not profess to carry, and were not in a habit of carrying, or only carried under special circumstances or subject to express stipulations limiting their liability in respect of them."

Ib. 188.

Lord C. J. Cockburn says:

"Persons holding themselves out to the world as common carriers are bound to act as such in respect to such goods as they profess to carry, and have accommodations to carry, on such goods being tendered to be carried, and, on a reasonable tender of proper remuneration, without subjecting the person tendering them to any unreasonable condition."

Garton vs. Bristol and Exeter R'y Co. 1 Best & Smith, 112, 162.

Parke, B. says:

"A person may profess to carry a particular description of goods only, for instance cattle or dry goods, in which case he could not be compelled to carry any other kind of goods; or he may limit his obligation to carrying from one place to another, as from Manchester to London, and then he would not be bound to carry to or from the intermediate places."

Johnson vs. Midland R'y Co. 4 Ec. 267.

We might multiply indefinitely. The following epitomizes the doctrine as decided by the courts:

"And hence, it by no means follows, from the fact that the carrier is a common carrier, that he can be required to carry all kinds of goods. The word "goods" when used in defining his business, must be interpreted to mean such things as, from usage and custom, his mode of conveyance, his public professions, the character of his particular trade or the manner of conducting it, he is to be fairly understood as holding himself out to the public as ready to carry for hire."

Hutchinson on Carriers, p. 75.

According to the plea the defendant has held itself out

as a common carrier only to its depots at Pensacola and not to the end of its wharf.

* * * * * * * *

If, however, the defendant was a common carrier, it does not follow that it had no right to discriminate between vessels seeking to use its terminal facilities.

One common carrier has not, independent of charter or contract, the right to use the terminals of another carrier.

We may admit that in ordinary transportation the depot of delivery is a part of the common carriage, and that the shipper has a right to have it used for the purpose of delivery of the goods transported, but he has no right to use it himself, or to have any other than the transporting carrier use it. The transporter undertakes for itself the duty of transportation and delivery, but there is no obligation on it to permit the use of any of its facilities by another carrier, whether such facilities be its tracks or its terminals.

It must not unreasonably discriminate between persons for whom it carries, but its carriage being complete, it has the right to select the agency by which any further delivery is to be performed. The management of its own property, the right to protect its own interests, when not compelled by any rule of law to subordinate them to the interest of the public, require that it shall decide to whom the use of its property shall to any extent be committed, and with whom it will associate itself in the performance of its duties. These principles have been decided so many times that we content ourselves with calling attention to some of the decisions establishing them.

It will be remembered that the attempt of the plaintiff is to compel the defendant to permit vessels, other than those chosen by it, to continue the transportation begun by it, and in so doing to go alongside of, attach to, and avail themselves of the use of defendant's wharf.

The Supreme Court of the United States says:

"At common law, a carrier is not bound to carry except on his own line, and we think it quite clear that if he contracts to go beyond he may, in the absence of statutory regulations to the contrary, determine for himself what agencies he will employ. His contract is equivalent to an extension of his line for the purposes of his contract, and if

he holds himself out as a carrier beyond the line, so that he may be required to carry in that way for all alike, he may nevertheless confine himself in carrying to the particular route he chooses to use. He puts himself in no worse position by extending his route with the help of others, than he would occupy if the means of transportation were all his own. He certainly may select his own agencies and his own associates for doing his own work."

A. T., & S. F. R. R. Co. vs. Denver & New Orleans, &c., 110 U. S. Rep., 607.

In a case where the defendant refused to make with the complainant like traffic and billing arrangements as it made with a competitor (the Mallory Line) of the complainant, and the defendant was thereby practically refusing "to transact any business" with the complainant by and over defendant's wharf at Galveston, and the complainant asked that the defendant should be commanded "to afford to the complainant the same facilities, and accept freight upon the same conditions as by it extended or granted to other connecting steamship lines," *this court* adopted the language of the foregoing case and refused to hold that the defendant railway was, in doing as complained, violating any right, common law or other, of the complainant.

Gulf C. S. & F. Ry. vs. Miami S. S. Co. 86 Fed. 407, 416, 422.

The Circuit Court of Appeals of the Eighth Circuit holds that:

"An interstate carrier which enters into an arrangement with a connecting carrier for through billing, rating and loading, *and for the use of its tracks and terminals*, is not obliged to make the same arrangement with other connecting carriers, though the physical facilities for an interchange of traffic are the same."

The court negatived the soundness of the contention,

"That when a carrier, of its own volition, enters into an agreement of that nature with another connecting carrier, the law commands it to extend 'equal facilities' to all other connecting carriers, if the physical connection is made at or about the same place, and the physical facilities for an interchange of traffic are the same, and that this latter duty the courts may and should enforce."

And also the proposition that the court could,

"Put in force between two carriers an arrangement for

an interchange of traffic that may be of great financial importance to both, which could neither be established nor enforced by judicial decree, except for the fact that one of the parties had previously seen fit to make a similar arrangement with some other connecting carrier."

Little Rock & M. R. Co. vs. St. Louis S. W. Ry. Co. 63 Fed. Rep. 775, 781.

The same decision had been made in the court below, in which Judge Williams said, referring to the result of previous decisions:

"These adjudications establish four propositions: First, that the tracks and terminal facilities of the defendants can only be used by the plaintiff railway for the exchange of interstate freight, with the consent of the defendants: Second, *that no common carrier can justly complain of another because it is not allowed the use of the tracks and terminal facilities of such other railway company in the same manner and to the same extent another is:* Third, that the fact that one connecting railway company has a contract for the interchange of interstate commerce freight, which involves the use of the receiving railway's tracks and terminal facilities, would not authorize a court of equity to compel the receiving railway to grant a like contract or concession to another connecting company."

(The fourth proposition is not material here.)

Little Rock & M. R. R Co. vs. St. Louis I. M. & S. Ry. Co. 59 Fed. Rep. 404.

In the Circuit Court of the Western District of Missouri, the court decided:

"Neither public policy nor any legislation forbids a railroad company engaged in interstate commerce to make an exclusive contract with a carrier, whose route connects with and extends beyond that of such railroad company, for through billing and rating over the connecting lines, and by which such carrier is given the exclusive right to receive from the railroad company and forward freight destined to points beyond the line of such railroad."

In the opinion the court states both the effect of the interstate commerce law and of the common law, or public policy.

St. Louis Drayage Co. vs. L. & N. R. R. Co., 65 Fed. Rep., 39.

Justice Jackson says:

"It is left open to any common carrier to contract, or enter into arrangements for the use of its tracks and terminal facilities with one or more connecting lines, without subjecting itself to the charge of giving an undue or unreasonable preference or advantage to such lines, or of discriminating against other carriers who are not parties to, or included in, such arrangements. No common carrier can therefore justly complain of another that it is not allowed the use of that other's tracks and terminal facilities upon the same or like terms and conditions which, under private contract or agreement, are conceded to other lines."

Kentucky & I. Bridge Co. vs. L. & N. R. R. Co., 37 Fed. Rep., 567–628.

Justice Field later approved and applied the same holding, adding:

"In making arrangements for such use by other companies, a common carrier will be governed by considerations of what is best for its own interests. The act does not purport to divest the railway carrier of its exclusive right to control its own affairs, except in the specific particulars indicated."

Oregon Short Line, &c., vs. Northern Pac. R. R. Co. 51 Fed. Rep. 465, 475.

The Circuit Court of Appeals of the Ninth Circuit has held:

"A transportation company operating a railway and a line of steamboats connecting at the company's wharf is not required, by the third section of the interstate commerce act, to permit the boats of a competitor to land at such wharf."

Ilwaco Ry. & Nav. Co. vs. Oregon Short Line &c, 57 Fed. Rep. 673.

This case is instructive, though differing from the case at bar in detail, because the steamers with which the railroad company connected were under its control and a part of its line.

The law is the same in England. See as much in point:

Napier vs. Glasgow and Southwestern Ry. Co., 1 Nev. & Mac., 292.

In many of the federal cases above cited, reliance was had by the complaining party upon the third section of the interstate commerce act forbidding discriminations between

connecting lines, but the courts decided that the saving clause at the end, "but this shall not be construed as requiring any such common carrier to give the use of its tracks or terminal facilities to another carrier engaged in a like business," prevented the application of the preceding provisions as to discriminations. This proviso, however, was not the conferring of a new right upon the carrier, but the saving of pre-existing rights which might otherwise have been affected, and the decisions mentioned necessarily decided that neither the statute nor the common law restricted the right of the carrier to discriminate in the use of its terminal facilities between other carriers desiring to use them.

Against these authorities, the plaintiff in error was able in the court below to cite only two apparently in conflict—the cases of Indian River Steamboat Co. vs. East Coast Transportation Co., 28 Fla., 480, and the case of Oregon Short Line, &c. vs. Ilwaco, &c., 51 Fed. 611.

Of the former, it is only necessary to say that it was, whatever its general reasoning, justified by the statute of the state, mentioned in the opinion, which provided that no common carrier should "make any unjust discrimination in receiving freight from, or the delivery of freight to, any competing lines of steamboats in the state." Outside of this, the reasoning of the court (as remarked in 57 Fed. Rep. 676) is in conflict with the decision in the Express cases, 117 U. S. 29, and with the cases which we have heretofore cited.

It may be well to say that this statute had been repealed at the time of the occurrences mentioned in the declaration, and was not in force.

Even if it had been, it could not have affected this intrastate commerce:

Gulf C F. & S. R'y vs. Miami S. S. Co. 86 Fed. 420.

Of the other case, it suffices to say that it was reversed upon appeal in Ilwaco, &c. vs. Oregon, &c. 57 Fed. 673.

* * * * * * * *

The cases which treat of the right of a railway company to discriminate between draymen, hackmen, etc., desiring to use the depots and like facilities of a railroad, decide the principle of this case. While such decisions are in conflict, the vast weight of them is in favor of the right of the carrier to select from the persons desiring such facilities,

one or more with whom it can make arrangement agreeable to it, and refuse to permit the others the use of such facilities. These authorities are collected in Henry Donovan vs. Pennsylvania Co., decided by the Circuit Court of Appeals in the Seventh Circuit, 120 Fed. 215.

We have verified those holding with our contention as follows:

Jencks vs. Coleman, 2 Sumner, 221: 13 Fed. Cas. 442;
Barker vs. Midland R'y Co. 18 C. B. 46: 86 E. C. L. R. 45;
Beadell vs. Eastern Counties Ry. Co. 2 C. B. (N. S.) 509: 89 E. C. L. R. 509;
Painter vs. London etc. Ry. Co. 2 C. B. (N. S.) 702: 89 E. C. L. R. 701;
Barney vs. Oyster Bay Steamboat Co. 67 N. Y. 301;
Barney vs. D. R. Martin, 11 Blatch. 534: 2 Fed. Cas. 892;
Old Colony R. Co. vs. Tripp, 147 Mass. 35: 17 N. E. 89;
Commonwealth vs. Carey, 147 Mass. 40: 17 N. E. 97;
Fluker vs. Georgia Ry. Co. 81 Ga. 461;
Griswold vs. Webb, 16 R. I. 649: 7 L. R. A. 302;
Smith vs. N. Y. L. E. & W. R. Co. 149 Pa. St. 249: 24 Atl. 304;
N. Y. Cent. R. Co. vs. Flinn, 74 Hun. 124: 26 N. Y. Supp. 859;
N. Y. Cent. Ry. Co. vs. Sheeley, 27 N. Y. Supp. 185;
Brown vs. N. Y. Cent. Ry. Co. 75 Hun. 355; 27 N. Y. Supp. 69; 46 N. E. 1145;
Summit vs. State, 76 Tenn. 413: 41 Am. Rep. 637;
Lucas vs. Herbert, 148 Ind. 64: 37 L. R. A. 376;
N. Y. R. R. Co. vs. Scovill, 71 Conn. 136: 42 L. R. A. 157;
Kates vs. Cab Co. 107 Ga. 636: 46 L. R. A. 431;
Godbout vs. St. Paul Union Depot, 79 Minn. 188: 47 L. R. A. 532;
N. Y. Cent. R. Co. vs. Warren, 64 N. Y. Supp. 781;
Boston & Albany R. Co. vs. Brown, 177 Mass. 65: 58 N. E. 189;
Boston & Maine R. Co. vs. Sullivan, 177 Mass. 230: 58 N. E. 689;
N. Y. etc. R. Co. vs. Bork, 23 R. I.: 49 Atl. 965.

* * * * * * * *

It will be noted that the declaration of the plaintiff makes no case of discrimination against it or the public. It alleges that certain vessels with which it had contracted, were not allowed to come to the defendant's wharf, but it does not allege that it was hindered, delayed or prevented in the slightest degree by the failure of such vessels to come to the wharf or receive its goods for transportation, for there is no allegation that it was not able to ship with equal cheapness, expedition and convenience by other vessels coming to such wharf and destined to the same port. The non-existence of such vessels so destined is not stated. In short, plaintiff stands itself squarely upon the proposition that it had made a contract with certain vessels which necessitated the use by them of the defendant's wharf. Of course the defendant had nothing to do with such special contract. Its duty, if any, was to permit the plaintiff to ship by way of its wharf as cheaply, expeditiously and conveniently as it allowed others to ship. There is no negation in the declaration of the performance of this duty, while the plea expressly affirms it. As the case stands then, on the declaration and plea, the plaintiff and all other patrons of the road were served with exact equality, but there is no showing that the service which it would have received from vessels other than those contracted with by it would not have been the exact equivalent in every respect of those which it would have received from the vessels contracted with.

Then, the plaintiff has no cause of action unless it be law that it can sue for the deprivation of an alleged right of the vessels last mentioned, by which deprivation it has not been in the slightest injured,—a proposition which we imagine will not be asserted by it.

It is especially true that one COMPETING common carrier has not, independent of statute or contract, the right to use the terminals of another carrier.

A corporation by becoming a carrier does not put itself out of the pale of the application of ordinary business principles. Whatever justice there might be in compelling a carrier to devote its terminals upon equal terms to all the public when the interests of the public are coincident with, or, at least, not antagonistic to the carrier, there can be none in requiring it to devote a part of its facilities, con-

structed for its own use, to the benefit of an opponent, whose upbuilding must be at its expense, and such is not the law.

There is no common law which prohibits any and every discrimination; that prohibited is that which is unreasonable. It is needless to recapitulate the many instances of reasonable discrimination permitted, and it will suffice to say that among them is that which is required for a proper protection of its business interests against competition.

We might multiply authorities and instances, but we content ourselves with saying that the only federal case apparently contrary to our contention here was expressly put upon the ground that the steamship company was as to the railroad company "not a rival in its railroad business."

Oregon, &c. vs. Ilwaco, &c. 51 Fed 611.

And by saying that the right of a railroad company to discriminate to the extent of protecting itself is fully recognized by this Court in (among other cases,)

Tex. & Pac. R'y Co. vs. Interstate Com. Com'n. 162 U. S. 197.

It is also especially true that one common carrier has not, independent of statute or contract, the right to use the WHARF of another carrier.

The capacity of a wharf is necessarily limited. If many vessels desire its use, and it be open to all, waits for a berth would be frequent. By reason of the freedom of the wharf, the first vessel coming must be the first served. Regularity and certainty of access will be impossible. Each wait entails a loss, and a succession of losses means an abandonment of the use of the wharf and of the trade which is possible only by such use. Thus, the very freedom becomes the cause of its disuse and failure to accomplish the purpose of its creation.

A public wharf at the terminus of a railroad which is part of a large export or import business is an impossibility. The right of free resort by all vessels produces conditions which kill the business itself. The sea carriage of to-day is done in steam vessels, and an essential of their success is certainty of dispatch. This cannot be secured if a chance comer or Ishmaelite has the right to a berth from which the regular liner must be excluded until a vacancy occurs.

The liner ceases to be a liner because there is no line, it being driven out of existence by the certain losses resulting from the delays and hindrances at the wharf. The business of the railroad company is destroyed, the public suffers, and the only temporary gainer is the sporadic vessel, which, in turn, is forced to withdraw because of the want of traffic connections with the railroad company and of profit in the business.

At this time, no successful exporting and importing business by sea can be done without the closest co-operation between the railroad taking the merchandise to and from the seaboard and the steamers taking it to and from foreign ports. Each must be informed definitely of the movements of the other, and each must co-operate with the other. Cargoes to be shipped must be collected from different points in the interior and transported to the seaboard. These collections must be more or less simultaneous, and must ordinarily precede but little in time the arrival and readiness of the steamer to load the cargoes collected. A want of coincidence between the arrival of the steamers and the cargoes means delay and loss to the railroad company or the steamer. Such want may result from a failure of the steamer to notify the railroad company of its prospective arrival, or of the railroad company to provide cargo with the requisite expedition and fullness. A failure of the steamer to secure her berth promptly, entails a loss on both.

The necessary co-operation and harmony can be secured only by business connections between the one and the other. In such case, the railroad company can arrange in advance for the cargoes and berthing of the incoming steamer, and the steamer by timely notice and effort can prevent delay to the shipper and railroad carrier.

This would be impossible if the race for the wharf facilities be free for all, for in such a race, all system, regularity and certainty is lost, and the resultant chaos is synonymous with loss to all concerned.

The uncertainty of arrival and departure prevents the proper collection of freights by the railroad company, the certain delays destroy the profits of the steamship lines, the occasional user cannot, because of the breaking down of the business of the railroad company, obtain the proper freight accommodations, even if the railroad carrier be dis-

posed to give them, and the public stands between the upper and nether mill-stones, and sees its business interests annihilated by the fantasy of a public wharf.

It is evident, too, that no good can accrue to lines of steamers only from the right to physical connection with the wharf. As we have seen, it is well settled in the federal courts that traffic connections and co-operation cannot be forced upon an unwilling carrier; and yet, without them, the right to use the wharf would be practically barren of results, for the procurement of cargoes, the arrangement for shipping them, etc., are absolutely necessary to successful shipments of products to be brought by railroads to the sea for shipment.

Besides, the railroad itself has rights. Because it is a common carrier, it is not deprived of the right to apply sound business principles to the workings of its various departments. No common law or public policy requires that for a fanciful equality of service, it should sacrifice its interests as well as the interests of the public. Discriminations have always been held justifiable when not unreasonable and unjust, taking into consideration the several interests to be affected, and no court has ever held that it is reasonable to require a carrier to sacrifice any branch of its business in order that strict equality may be produced, especially when such equality must infallibly injure the public.

The very nature of a wharf and its inadequacy to meet the demands of every incoming vessel, necessitates that its use shall be exclusively for those with whom the carrier enters into arrangements. The carrier has the right to select a strong connection instead of a weak one—one able to give assurance of permanent business, instead of one which can offer only occasional shipments. If the free use is incompatible with the certain, regular use by a steamer or lines of steamers with which the carrier is aligned, it seems too clear for further reasoning that such carrier has the right to accept the latter and thereby exclude the former.

An illustration or two will suffice:

The Pennsylvania Railroad Co. has docks in Jersey City for the reception and discharge of passengers on its line. It has at present ferry boats belonging to itself, bringing and taking passengers to and from the New York

side of North River. If, however, it only had a contract with an independent line of ferry boats to perform this service, could an outside boat insist that it, too, had a right to bring passengers and claim a berth at the dock for their discharge, and insist that the regular boats employed by the company should wait until the berth was vacated by it? What would become of the regularity of schedule and service which the public has a right to require, and from which the railroad company has a right to make a profit? And when the interloper has succeeded in driving the regulars off, how would the public be served? Other contracts for regular service could not be obtained because of the liability to interruption and consequent destruction of profits, and the public would not be served at all.

To make the query exactly applicable to this case: Would, in the event supposed, a passenger who came from Philadelphia to Jersey City over the railroad company's lines, have a right to insist that a ferry boat to be selected by him should be allowed to come into the railroad company's slips in order to ferry him across, even though it delayed and excluded the regular ferry boat, and in case that the railroad company refused to permit such access to such outside boat, to bring suit against such company for such refusal to let such outside boat have the use of its terminal facilities?

Without particularizing further, what would become of the export and import business of the country if the steamship wharves in New York City, Philadelphia, Boston, Baltimore, New Orleans, etc., etc., to which the ocean liners have a right by contract to come, should be open to every tramp steamer desiring to use them, and the liners be liable at any time to find their berths occupied indefinitely by one or more steamers prior in point of arrival, and they be thereby cut off from their usual rail or other connections necessary for the distribution of the freight brought by them?

There can be but one answer to a proposition which involves such consequences.

The principles governing this branch of this case are well set forth by the Supreme Court of the United States showing the impossibility where facilities of the carrier are limited, of affording such facilities to other common carriers without regard to the interests of the carrier itself or of the

public. The decision mentioned was in the Express cases, where the court declined to hold that a railroad company was compelled to furnish express facilities to any express company desiring the use of its trains. Its language may be almost inserted bodily into the facts in this case by substituting the word "wharf" for "train," and the word "vessel" for "express companies." The language is as follows:

"The express business on passenger trains is in a degree subordinate to the passenger business, and it is consequently the duty of a railroad company in arranging for the express to see that there is as little interference as possible with the wants of passengers. This implies a special understanding and agreement as to the amount of car space that will be afforded, and the conditions on which it is to be occupied, the particular trains that can be used, the places at which they shall stop, the price to be paid, and all the varying details of a business which is to be adjusted between two public servants, so that each can perform in the best manner its own particular duties. All this must necessarily be a matter of bargain, and it by no means follows that because a railroad company can serve one express company in one way, it can as well serve another company in the same way, and still perform its other obligations to the public in a satisfactory manner. The car space that can be given to the express business on a passenger train is, to a certain extent, limited, and, as has been seen, that which is allotted to a particular carrier must be, in a measure, under his exclusive control. No express company can do a successful business unless it is at all times reasonably sure of the means it requires for transportation. On important lines one company will at times fill all the space one railroad company can well allow for the business. If this space had to be divided among several companies, there might be occasions when the public would be put to inconvenience by delays which could otherwise be avoided. So long as the public are served to their reasonable satisfaction, it is a matter of no importance who serves them. The railroad company performs its whole duty to the public at large and to each individual when it affords the public all reasonable express accommodations. If this is done the railroad company owes no duty to the public as to the particular agencies it shall select for that purpose."

Express Cases, 117 U. S. 1 and 24.

See also:

C. St. L. & N. O. R'y Co. vs. Pullman S. Car Co. 139 U. S. 79.

And in a case where the Judge refused to compel a railroad company to employ a particular transfer company, and decided that it had the right to select such transfer company as it might see fit as its connecting carrier, the court used the following language particularly applicable to the case at bar:

"To this end it was essential that, in selecting a company for the transfer of its freights between St. Louis and East St. Louis, it should secure one fully equipped for doing the business,—solvent and reliable. It could not afford to take chances in so grave a matter. It might be unsafe to trust to the caprice of competing transfer companies, or to sporadic rivalries. It could not foresee how long it would be before the railroad company, in such dependence might find itself a prey to a 'combine' among the transfer companies, or become exposed to the not improbable contingency of a rivalry between competing companies, which would break both down, leaving the railroad company without a certain reliable connection with the city. It would be harsh, unreasonable, and questionable legislation that would deny to the common carrier the protection of a provident, reliable contract, like the one in question."

St. Louis Drayage Co. vs. L. & N. R. R. Co. 65 Fed. 39, 42.

Special Grounds for the Petition.

First:

The decision of the Circuit Court of Appeals is in conflict with the decisions of this Court.

There is no original reasoning indulged in by the Circuit Court of Appeals, but it contents itself with citing and quoting from a case in the Supreme Court of Florida and a case in the Supreme Court of Washington to sustain its holding and we must look to these quotations to determine the grounds upon which the Circuit Court of Appeals based its decision.

The doctrine of the Florida case, as adopted by the Court below, is, as stated by itself, that a railroad corporation owning a wharf in a navigable stream

and having tracks thereon "has no right to lease the terminal point of its railroad tracks and terminal facilities on a navigable stream to a steamboat company and, thereby, defeat the ingress and egress to and from said railroad tracks on the part of other competing lines of steamboat companies." (Indian River Steamboat Company vs. East Coast Transportation Company, 28 Fla. 387.)

And again, "if it be competent to sustain such a contract (*i. e.* a contract permitting one boat to use its wharf and excluding another from such use) the common carrier can select one connecting line of boats and exclude all others from doing business with it. Such a doctrine would lead to the legalizing of a monopoly and the sanction of an unfair and unjust preference between connecting and competing lines of transportation."

As we understand the decisions of this Court, the carrier has just such power of discrimination and preference. The doctrine of this Court is:

"At common law, a carrier is not bound to carry except on its own line, and we think it quite clear that if he contracts to go beyond he may, in the absence of statutory regulations to the contrary, determine for himself what agencies he will employ. His contract is equivalent to an extension of his line for the purposes of his contract, and if he holds himself out as a carrier beyond the line, so that he may be required to carry in that way for all alike, he may nevertheless confine himself in carrying to the particular route he chooses to use. He puts himself in no worse position by extending his route with the help of others, than he would occupy if the means of transportation were all his own. He certainly may select his own agencies and his own associates for doing his own work."

A. T. & S. F. R. R. Co. vs. Denver & New Orleans, &c., 110 U. S. Rep. 607.

And the right of discrimination between competing lines of transportation is distinctly recognized by this Court in the case where it is held that a railroad company may welcome one and exclude another express company.

Express Cases, 117 U. S. 1 & 24.

In this case the Court says:

"So long as the public are served to their reasonable satisfaction, it is a matter of no importance who serves them. The railroad company performs its whole duty to the public

at large and to each individual when it affords the public all reasonable express accommodations. If this is done the railroad company owes no duty to the public as to the particular agencies it shall select for that purpose."

The same idea is embraced in the case of Chicago & St. L. & N. O. Ry. Co. vs. Pullman Car Co. 139 U. S. 79, where the Court says:

"The defendant was under a duty, arising from the public nature of its employment, to furnish for the use of passengers on its lines such accommodations as were reasonably required by the existing conditions of passenger traffic. Its duty, as a carrier of passengers, was to make suitable provisions for their comfort and safety. Instead of furnishing its own drawing room and sleeping cars, as it might have done, it employed the plaintiff, whose special business was to provide cars of that character, to supply as many as were necessary to meet the requirements of travel. It thus used the instrumentality of another corporation in order that it might properly discharge its duty to the public. So long as the defendant's lines were supplied with the requisite number of drawing-room and sleeping cars, it was a matter of indifference to the public who owned them."

It will be noted that in the declaration in the instant case there is no allegation that the public, or the plaintiff as one of the public, has not been fully served in the facilities provided by the defendant for the transporting of exports from the end of its line (its wharf,) to the unnamed ports mentioned in the declaration, to which the plaintiff desired to ship. In view of this we think it unnecessary to discuss the question as to whether there is any obligation upon a railroad company to provide facilities for transportation beyond the end of its line.

The power of discrimination by railroad companies against other carriers, when necessary or expedient for the subserving of its own interest, or that of the public, is fully set forth in the opinion of this Court in,

Texas & Pacific Ry. Co. vs. Interstate Commerce Commission, 162 U. S. 218, *et seq.*

The case of Barrington vs. Commercial Dock Co. (Wash.) 45 Pac. 748, is, if in point, directly opposed to the principles enunciated, as above, by this Court.

It is, however, not in point, for it merely determines that a wharf unconnected with a railroad, and in no sense one of

its terminals, cannot be partially without being wholly thrown open to the use of the public. It does not, and could not, touch upon and decide the larger question, in this case, as to the relations of carriers to each other; the control of one carrier over its terminals to the exclusion of another; the right of one carrier to make transportation arrangements with one connecting carrier without being compelled to make like arrangements with every other carrier, and the right of a carrier with limited facilities like a wharf, to so regulate the use of that wharf as to best protect itself and the interests of the public.

The only suggestion made by the Circuit Court of Appeals not extracted from the opinions in the cases in the Supreme Courts of Florida and Washington, is that, if the wharf in question "was used by the railroad company solely for its own carrying business, in connection with its own lines, a different case would be presented." This view is in direct opposition to the opinions in this Court, that a carrier "puts himself in no worse position by extending his route with the help of others, than he would occupy if the means of transportation were all his own. He certainly may select his own agencies and his own associates for doing his own work."

A. T. & S. R. R. Co. vs. Denver & N. O. &c., R. R. Co. 110 U. S. 680.

And that if a carrier affords all reasonable accommodation it "owes no duty to the public as to the particular agencies it shall select for that purpose."

Express Cases, 117 U. S. 1 & 24.

Second.

The decision of the Court below is contrary to the decisions of other Circuit Courts of Appeal and United States Circuit Courts in other Circuits.

These cases are:

(C. C. A. 8th Circuit)—Little Rock &c. vs. St. Louis &c. Ry. Co. 61 Fed. 775–781;

(C. C. A. 9th Circuit)—Ilwaco Navigation Co. vs. Oregon Short Line &c. 57 Fed. 673;

Justice Jackson—Ky. & I. Bridge Co. vs. L. & N. R. R. Co. 37 Fed. 567–628;

Justice Field—Oregon Short Line vs. Northern Pac. R. R. Co. 51 Fed. 465–475;
Judge Williams—Little Rock & M. R. R. Co. vs. St. Louis &c. 59 Fed. 404;
Judge Phillips—St. Louis Drayage Co. vs. L. & N. R. R. Co. 65 Fed. 39.

It would be a useless repetition to set out the facts and decisions in these cases. They are commented on in preceding pages of this brief (pp. 11-14) and to that comment we refer.

Third.

The decision of the Court below is also in conflict with the decisions of the English Courts and the highest State Courts of Appeal of this country, in that it ignored the right of a carrier, in the absence of statute or charter requirements, to assume the obligations of a common carrier as to such commodities and such businesses as it may see fit, and to discriminate between other common carriers in the use of its terminal facilities. The authorities are already set forth herein on pages 6 to 10 of this brief.

Fourth and Fifth.

The question involved is of national importance and of international importance, in that it vitally concerns the largest businesses in the country and in every section of the union, and in that all the foreign export and import business of the country is done from wharves. It would be but repetition to place here what we have heretofore said upon this subject in this brief on pages 17 to 20, and we refer to those pages as an elaboration of this sub-division of our brief.

We respectfully submit that the reasoning of authorities which we have set forth above show that the Court below erred and that the question is of such special importance that this Court should review the decision of that Court.

Respectfully submitted,

WILLIAM A. BLOUNT AND
A. C. BLOUNT, JR.
Attorneys for Petitioners.

UNITED STATES SUPREME COURT.

OCTOBER TERM, 1904.

Number 225.

LOUISVILLE & NASHVILLE RY. CO.,
PLAINTIFF IN ERROR,
VS.
WEST COAST NAVAL STORES CO.,
DEFENDANT IN ERROR.

BRIEF OF WILLIAM A. BLOUNT AND A. C. BLOUNT, JR., ATTORNEYS FOR PLAINTIFF IN ERROR.

THE PROCEEDINGS.

The defendant in error brought suit in the United States Circuit Court for the Northern District of Florida against the plaintiff in error. The defendant pleaded several pleas, which finally resolved themselves into one, called the Third Plea; the Circuit Court overruled a demurrer to this plea, and the defendant in error sued out a writ of error to the Circuit Court of Appeals for the 5th Judicial Circuit, which reversed the decision of the Circuit Court. The plaintiff in error then amended its pleadings so that only one plea remained; the defendant in error demurred to this, and the Court, following the Circuit Court of Appeals, sustained the demurrer. Upon a writ of error to the Circuit Court of Appeals this judgment was affirmed; this Court granted a writ of *certiorari* to review this judgment, and the case is now for argument here.

The issues of law arise only upon the declaration and the plea.

The record is so short that we need not repeat either the two counts of the declaration or the plea. The two

counts to my mind are identical, and the plea a full answer to them.

In our discussion when we used the word "plaintiff," we mean the plaintiff in the Circuit Court; when we use the word "defendant," we mean the defendant in that Court.

This plea, in connection with the counts to which it is an answer, presents the important question whether a railroad company which has provided ample facilities for the delivery by it of all freight committed to it for transportation to, and delivery at, a city on the seaboard, can, when not compelled by statute or charter, construct a wharf, place tracks thereon, connect them with its tracks leading thereto, and transport freight over such track for all persons alike and have the right to permit to come to such wharf, for the purpose of removing such freight, only such vessels as may run in regular lines in connection with it, or such as may come under special arrangements with it, and to refuse such wharf facilities to vessels which would come in competition with it, or with lines of steamers running in connection with it.

We affirm this right and the plaintiff denies it.

The plaintiff rests its proposition upon the idea that the defendant is a common carrier; that as such, it must serve all alike; that its wharf was the wharf of a common carrier, and thus a public wharf, to which all vessels had a right of access to receive freight transported by defendant, and that it is violation of such right to refuse to allow vessels selected by plaintiff to come to the wharf to receive freight.

The plaintiff's right, then, depends upon the right of vessels sought to be employed by it, for it is obvious that if they have no right to come, it has no right to demand that they come.

We rest our contention that the defendant has the right in dispute, upon the following propositions:

1. That the defendant is not, under the circumstances stated in the plea, a common carrier as to its wharf.

2. That one common carrier has not, independent of statute or contract, the right to use the terminals or like facilities of another carrier.

3. That this is peculiarly true as to another competing carrier.

4. And is specially applicable to wharf facilities.

The defendant is not, under the circumstances stated in the plea, a common carrier as to its wharf.

The plea, in connection with the declaration, shows that the defendant is a common carrier as to freight brought to Pensacola for delivery at that point. There is nothing to show that it is a common carrier as to its wharf, or that such wharf is public.

As we understand the law, no corporation can be held as a common carrier as to any particular commodity, or any particular portion of its line or facilities, unless the obligation be imposed by its charter or by uniform usage attaching itself to like corporations, or by the holding of itself out as such carrier. If there be no charter obligation or if the usage with such corporations be not so fixed as to necessarily imply an assumption of such obligation by the acceptance of the charter, then the only way in which the many onerous obligations of the common carrier can be imposed is by the voluntary assumption of them by a holding out.

The plea expressly denies that there was any charter obligation to construct a wharf, and hence to devote it to the public.

There is no allegation that railroad companies building wharves at their termini usually throw them open to the public for use.

Then, the only resort of the plaintiff in error must be to the doctrine advanced by it in the Court below, that by the construction of the wharf and by the defendant's permission to certain vessels to use it upon certain terms and for certain purposes, a duty was imposed to permit all vessels to use it upon like terms and for like purposes.

This is tantamount to an assertion that if the defendant serves some at its wharf, it must serve all others in the same way; that is, impose upon itself the duties of a common carrier as to its wharf.

This ignores, however, the law that, independent of the statute or custom, the duty is measured by the extent of voluntary assumption; that is, that a corporation can hold itself out to the public as willing to serve it and every member of it just as far as it pleases, and its liability will be co-extensive with such holding out. Thus: A railroad

company may restrict itself to carrying passengers, as in the case of inter-urban trolley lines;

May decline to carry dogs:

Dickson vs. Great Northern Ry., L. R., 18 Q. B., 176.

Or coals:

Oxlade vs. N. E. R. R. Co., (No. 2,) 1 Nev. & Mac., 162; 15 C. B., N. S. 680;

Johnson vs. Midland Ry. Co., 4 Exc. (Welsby, Hurlstone & Gordon,) 367.

Or money:

Hosea vs. McCrory, 12 Ala., 349;

Whitemore vs. Steamboat "Caroline," 20 Mo., 513.

Or cattle:

Lake Shore, &c., vs. Perkins, 25 Mich., 329.

Or any other article of transportation which may be sufficiently differentiated from articles actually carried by it as to be reasonably put into a distinct class.

So, it may devote portions of its facilities to its own use, or to the use of particular individuals, and thus refuse to be a common carrier as to those facilities. The mere fact that they belong to it or are used by it in connection with transportation does not subject them to the common use of the public.

Its offices, side tracks, etc., are of the first class, and its turn-outs to private manufacturing enterprises on its lines are of the second class. It is clear that because they are used as the incidents of general transportation, or as media of transportation to one person, they are not thus subject to the use of the public. In fact, the existence of the facility for one person does not compel the furnishing of a like facility to another; that is to say, because one industry has a side track, another like industry cannot require the same facility.

People vs. Spruance, 57 Ill., 437.

The principles are applicable to the case at bar. The wharf was built without statutory compulsion, and without the existence of any duty to the public, and the defendant had a right to impress upon it such character as it saw fit; either to devote it to the public or to reserve it for its own private use, or to offer its facilities to such persons as it might select, upon such considerations as seemed to it best. It chose the latter course, and the public cannot complain, for the choice lay with the defendant, and not with the public.

The question as to what imposes the obligations of a common carrier upon a corporation or person, has of course arisen most frequently in cases of tender of merchandise to be carried or of the failure of the carrier to carry safely after receipt, and a reference to the language of some of these cases will be instructive.

Justice Story says:

"The nature and extent of the employment or business which is authorized by the owners, on their own account and at their own risk, and which, either expressly or impliedly, they hold themselves out as undertaking, furnish the true limits of their rights, obligations, duties and liabilities. The question, therefore, in all cases of this sort, is, What are the true nature and extent of the employment and business in which the owners hold themselves out to the public as engaged?"

Citizens' Bank vs. Nantucket S. B. Co., 2 Story, 33.

Lindley, L. J., says:

"At common law no person is bound as a common carrier to carry any goods of a kind which he does not profess to carry. Unless he professes to carry dogs for people in general, he is not bound to carry a dog for any particular individual; and if a carrier says he will not carry dogs except on certain terms, he can lawfully refuse to carry any particular dog on any other terms. In this case the defendants expressly say they are not common carriers of dogs and will not carry dogs except on their own terms. The common law, therefore, does not oblige the company to carry dogs at all; and at common law no action will lie against the company for refusing to carry a dog. Moreover, as no person is bound to enter into an agreement with one person simply because he is in the habit of entering into similar agreements with others, a company which is not a common carrier of dogs, but which may be in the habit of carrying dogs on certain terms, may at common law decline to accept any particular dog, even on those terms, and may refuse to carry the dog at all, or may refuse to carry it except upon some other terms which the company may specify."

Dickson vs. Great Nor. Ry. Co., 18 Q. B. D., 183, 184.

Lopez, J., says:

"Generally railway companies like other carriers were common carriers of goods which they were bound by statute to carry, or which they professed to carry, or actually carried, for persons generally, but not of goods

which they did not profess to carry, and were not in a habit of carrying, or only carried under special circumstances or subject to express stipulations limiting their liability in respect of them."

Ib. 188.

Lord C. J. Cockburn says:

"Persons holding themselves out to the world as common carriers are bound to act as such in respect to such goods as they profess to carry, and have accommodations to carry, on such goods being tendered to be carried, and, on a reasonable tender of proper remuneration, without subjecting the person tendering them to any unreasonable condition."

Garton vs. Bristol and Exeter R'y Co. 1 Best & Smith, 112, 162.

Parke, B. says:

"A person may profess to carry a particular description of goods only, for instance cattle or dry goods, in which case he could not be compelled to carry any other kind of goods; or he may limit his obligation to carrying from one place to another, as from Manchester to London, and then he would not be bound to carry to or from the intermediate places."

Johnson vs. Midland R'y Co. 4 Exc. 267.

We might multiply indefinitely. The following epitomizes the doctrine as decided by the courts:

"And hence, it by no means follows, from the fact that the carrier is a common carrier, that he can be required to carry all kinds of goods. The word "goods" when used in defining his business, must be interpreted to mean such things as from usage and custom, his mode of conveyance, his public professions, the character of his particular trade or the manner of conducting it, he is to be fairly understood as holding himself out to the public as ready to carry for hire."

Hutchinson on Carriers, p. 75.

Acording to the plea the defendant has held itself out as a common carrier only to its depots at Pensacola and not to the end of its wharf.

* * * * * * * *

If, however, the defendant was a common carrier, it does

not follow that it had no right to discriminate between vessels seeking to use its terminal facilities.

One common carrier has not, independent of charter or contract, the right to use the terminals of another carrier.

We may admit that in ordinary transportation the depot of delivery is a part of the common carriage, and that the shipper has a right to have it used for the purpose of delivery of the goods transported, but he has no right to use it himself, or to have any other than the transporting carrier use it. The transporter undertakes for itself the duty of transportation and delivery, but there is no obligation on it to permit the use of any of its facilities by another carrier whether such facilities be its tracks or its terminals.

It must not unreasonably discriminate between persons for whom it carries, but its carriage being complete, it has the right to select the agency by which any further delivery is to be performed. The management of its own property, the right to protect its own interests, when not compelled by any rule of law to subordinate them to the interest of the public, require that it shall decide to whom the use of its property shall to any extent be committed, and with whom it will associate itself in the performance of its duties. These principles have been decided so many times that we content ourselves with calling attention to some of the decisions establishing them.

It will be remembered that the attempt of the plaintiff is to compel the defendant to permit vessels, other than those chosen by it, to continue the transportation begun by it, and in so doing to go alongside of, attach to, and avail themselves of the use of defendant's wharf.

This Court says:

"At common law, a carrier is not bound to carry except on his own line, and we think it quite clear that if he contracts to go beyond he may, in the absence of statutory regulations to the contrary, determine for himself what agencies he will employ. His contract is equivalent to an extension of his line for the purpose of his contract, and if he holds himself out as a carrier beyond the line, so that he may be required to carry in that way for all alike, he may nevertheless confine himself in carrying to the par-

ticular route he chooses to use. He puts himself in no worse position by extending his route with the help of others, than he would occupy if the means of transportation were all his own. He certainly may select his own agencies and his own associates for doing his own work."

A., T., & S. R. R. Co. vs. Denver & New Orleans, &c., 11 U. S. Rep. 607.

In a case where the defendant refused to make with the complainant like traffic and billing arrangements as it made with a competitior (the Mallory Line) of the complainant, and the defendant was thereby practically refusing "to transact any business" with the complainant by and over defendant's wharf at Galveston, and the complainant asked that the defendant should be commanded "to afford to the complainant the same facilities, and accept freight upon the same conditions as by it extended or granted to other connecting steamship lines," the Circuit Court of Appeals adopted the language of the foregoing case and refused to hold that the defendant railway was, in doing as complained, violating any right, common law or other, of the complainant.

Gulf C. S. & F. Ry. vs. Miami S. S. Co. 86 Fed. 407, 416, 422.

The Circuit Court of Appeals of the Eighth Circuit holds that:

"An interstate carrier which enters into an arrangement with a connecting carrier for through billing, rating and loading, *and for the use of its tracks and terminals,* is not obliged to make the same arrangement with other connecting carriers, though the physical facilities for an interchange of traffic are the same."

The court negatived the soundness of the contention,

"That when a carrier, of its own volition, enters into an agreement of that nature with another connecting carrier, the law commands it to extend equal facilities to all other connecting carriers, if the physical connection is made at or about the same place, and the physical facilities for an interchange of traffic are the same, and that this later duty the courts may and should enforce."

And also the proposition that the court could,

"Put in force between two carriers an arrangement for an interchange of traffic that may be of great financial importance to both, which could neither be established

nor enforced by judicial decree, except for the fact that one of the parties had previously seen fit to make a similar arrangement with some other connecting carrier."

Little Rock & M. R. Co. vs. St. Louis S. W. Ry. Co. 63 Fed. Rep. 775, 781.

The same decisions had been made in the court below, in which Judge Williams said, referring to the result of previous decisions:

"These adjudications establish four propositions: First, that the tracks and terminal facilities of the defendants can only be used by the plaintiff railway for the exchange of interstate freight, with the consent of the defendants: Second, *that no common carrier can justly complain of another because it is not allowed the use of the tracks and terminal facilities of such other railway company in the same manner and to the same extent another is*: Third, that the fact that one connecting railway company has a contract for the interchange of interstate commerce freight, which involves the use of the receiving railway's tracks and terminal facilities, would not authorize a court of equity to compel the receiving railway to grant a like contract or concession to another connecting company."

(The fourth proposition is not material here.)

Little Rock & M. R. R. Co. vs. St. Louis I. M. & S. Ry. Co. 59 Fed. Rep. 404.

In the Circuit Court of the Western District of Missouri, the court decided:

"Neither public policy nor any legislation forbids a railroad company engaged in interstate commerce to make an exclusive contract with a carrier, whose route connects with and extends beyond that of such railroad company, for through billing and rating over the connecting lines, and by which such carrier is given the exclusive right to receive from the railroad company and forward freight destined to points beyond the line of such railroad."

In the opinion the court states both the effect of the interstate commerce law and of the common law, or public policy.

St. Louis Drayage Co. vs. L. & N. R. R. Co., 65 Fed. Rep., 39.

Justice Jackson says:

"It is left open to any common carrier to contract, or

enter into arrangements for the use of its tracks and terminal facilities with one or more connecting lines, without subjecting itself to the charge of giving an undue or unreasonable preference or advantage to such lines, or of discriminating against other carriers who are not parties to, or included in, such arrangements. No common carrier can therefore justly complain of another that it is not allowed the use of that other's tracks and terminal facilities upon the same or like terms and conditions which, under private contract or agreement, are conceded to other lines."

Kentucky & I. Bridge Co. vs. L. & N. R. R. Co., 37 Fed. Rep., 567-628.

Justice Field later approved and applied the same holding, adding:

"In making arrangements for such use by other companies, a common carrier will be governed by considerations of what is best for its own interests. The act does not purport to divest the railway carrier of its exclusive right to control its own affairs, except in the specific particulars indicated."

Oregon Short Line &c., vs. Northern Pac. R. R. Co. 51 Fed. Rep. 465, 475.

The Circuit Court of Appeals of the Ninth Circuit has held:

"A transportation company operating a railway and a line of steamboats connecting at the company's wharf is not required, by the third section of the interstate commerce act, to permit the boats of a competitor to land at such wharf."

Ilwaco Ry. & Nav. Co. vs. Oregon Short Line &c., 57 Fed. Rep. 673.

This case is instructive, though differing from the case at bar in detail, because the steamers with which the railroad company connected were under its control and a part of its line.

The law is the same in England. See as much in point:

Napier vs. Glasgow and Southwestern Ry. Co., 1 Nev. & Mac., 292.

In many of the federal cases above cited, reliance was had by the complaining party upon the third section of the interstate commerce act forbidding discriminations between connecting lines, but the courts decided that the saving clause at the end, "but this shall not be construed

as requiring any such common carrier to give the use of its tracks or terminal facilities to another carrier engaged in a like business," prevented the application of the preceding provisions as to discriminations. This proviso, however, was not the conferring of a new right upon the carrier, but the saving of pre-existing rights which might otherwise have been affected, and the decisions mentioned necessarily decided that neither the statute nor the common law restricted the right of the carrier to discriminate in the use of its terminal facilities between other carriers desiring to use them.

Against these authorities, the plaintiff in error was able in the court below to cite only two apparently in conflict—the cases of Indian River Steamboat Co. vs. East Coast Transportation Co., 28 Fla., 480, and the case of Oregon Short Line, &c. vs. Ilwaco, &c., 51 Fed. 611.

Of the former, it is only necessary to say that it was, whatever its general reasoning, justified by the statute of the state, mentioned in the opinion, which provided that no common carrier should "make any unjust discrimination in receiving freight from, or the delivery of freight to, any competing lines of steamboats in the state." Outside of this the reasoning of the court (as remarked in 57 Fed. Rep. 676) is in conflict with the decision in the Express cases, 117 U. S. 29, and with the cases which we have heretofore cited.

It may be well to say that this statute had been repealed at the time of the occurrences mentioned in the declaration, and was not in force.

Even if it had been, it could not have affected this interstate commerce:

Gulf C. F. & S. R'y vs. Miami S. S. Co. 86 Fed. 420.

Of the other case, it suffices to say that it was reversed upon appeal in Ilwaco &c. vs. Oregon, &c. 57 Fed. 673.

* * * * * * *

The cases which treat of the right of a railway company to discriminate between draymen, hackmen, etc., desiring to use the depot and like facilities of the railroad, decide the principle of this case. While such decisons are in conflict, the vast weight of them is in favor of the right of the carrier to select from the persons desiring such facilities, one or more with whom it can make agreements agreeable to it, and refuse to permit the others the use of such facilities.

Those holding with our contention are as follows:

Henry Donovan vs. Pennsylvania Co. C. C. A., 7th Circuit, Oct., 1902.

Jencks vs. Coleman, 2 Sumner, 221, 13 Fed. Cas. 442;

Barker vs. Midland R'y Co. 18 C. B. 46, 86 E. C. L. R. 45;

Beadell vs. Eastern Counties Ry. Co. 2 C. B. (N. S.) 509, 89 E. C. L. R. 509;

Painter vs. London etc. Ry. Co. 2 C. B. (N. S.) 702, 89 E. C. L. R. 701;

Barney vs. Oyster Bay Steamboat Co. 67 N. Y. 301;

Barney vs. D. R. Martin, 11 Blatch, 534, 2 ed. Cas. 892;

Old Colony R. Co. vs. Tripp, 147 Mass. 35, 17 N. E. 89;

Commonwealth vs. Carey, 147 Mass. 40, 17 N. E. 97;

Fluker vs. Georgia Ry. Co. 81 Ga. 461;

Griswold vs. Webb, 16 R. I. 649, L. R. A. 302;

Smith vs. N. Y. L. E. & W. R. Co. 149 Pa. St. 249; 24 Atl. 304;

N. Y. Cent. R. Co. vs. Flinn, 74 Hun. 124, 26 N. Y. Supp. 859;

N. Y. Cent. Ry. Co. vs. Sheeley, 27 N. Y. Supp. 185;

Brown vs. N. Y. Cent. Ry. Co. 75 Hun. 355, 27 N. Y. Supp. 69; s. c. 46 N. E. 1145;

Summit vs. State, 76 Tenn. 413, 41 Am. Rep. 637;

Lucas vs. Herbert, 148 Ind. 64, 37 L. R. A. 376;

N. Y. R. R. Co. vs. Scovill, 71 Conn. 136, 42 L. R. A. 157;

Kates vs. Cab Co. 107 Ga. 636, 46 L. R. A. 431;

Godbout vs. St. Paul Union Depot, 79 Minn. 188; 47 L. R. A. 532;

N. Y. Cent. R. Co. vs. Warren, 64 N. Y. Supp. 781;

Boston & Albany R. Co. vs. Brown, 177 Mass. 65, 58 N. E. 189;

Boston & Maine R. Co. vs. Sullivan, 177 Mass. 230, 58 N. E. 689;

N. Y. etc. R. Co. vs. Bork, 23 R. I. 49 Atl. 965.

* * * * * * *

It will be noted that the declaration of the plaintiff makes no case of discrimination against it or the public. It alleges that certain vassels with which it had contracted, were not allowed to come to the defendant's wharf, but it does not allege that it was hindered, delayed or pre-

vented in the slightest degree by the failure of such vessels to come to the wharf or receive its good for transportation, for there is no allegation that it was not able to ship with equal cheapness, expedition and convenience by other vessels coming to such wharf and destined to the same port. The non-existence of such vessels so destined is not stated. In short, plaintiff stands itself squarely upon the proposition that it had made a contract with certain vessels which necessitated the use by them of the defendant's wharf. Of course the defendant had nothing to do with such special contract. Its duty, if any, was to permit the plaintiff to ship by way of its wharf as cheaply, expeditiously and conveniently as it allowed others to ship. There is no negation in the declaration of the performance of this duty, while the plea expressly affirms it. As the case stands then, on the declaration and plea, the plaintiff and all other patrons of the road were served with exact equality, but there is no showing that the service which it would have received from vessels other than those contracted with by it would not have been the exact equivalent in every respect of that which it would have received from the vessels contracted with.

Then, plaintiff has no cause of action unless it be law that it can sue for the deprivation of an alleged right of the vessels last mentioned, by which deprivation it has not been in the slightest injured,—a proposition which we imagine will not be asserted by it.

It is especially true that one COMPETING common carrier has not, independent of statute or contract, the right to use the terminals of another carrier.

A corporation by becoming a carrier does not put itself out of the pale of the application of ordinary business principles. Whatever justice there might be in compelling a carrier to devote its terminals upon equal terms to all the public when the interests of the public are coincident with, or, at least, not antagonistic to the carrier, there can be none in requiring it to devote a part of its facilities, constructed for its own use, to the benefit of an opponent, whose upbuilding must be at its expense, and such is not the law.

There is no common law which prohibits any and every discrimination; that prohibited is that which is unreasonable. It is needless to recapitulate the many instances

of reasonable discrimination permitted, and it will suffice to say that among them is that which is required for a proper protection of its business interests against competition.

We might multiply authorities and instances, but we content ourselves with saying that the only federal case apparently contrary to our contention here was expressly put upon the ground that the steamship company was as to the railroad company "a rival in its railroad business:"

Oregon, &c., vs. Ilwaco, &c., 51 Fed. 611.

And by saying that the right of a railroad company to discriminate to the extent of protecting itself is fully recognized by the Supreme Court of the United States in (among other cases).

Tex. & Pac. R'y Co. vs. Interstate Com. Com'n, 162 U. S. 197.

It is also especially true that one common carrier has not, independent of statute or contract, the right to use the WHARF of another carrier.

The capacity of a wharf is necessarily limited. If many vessels desire its use, and it be open to all, waits for a berth would be frequent. By reason of the freedom of the wharf, the first vessel coming must be the first served. Regularity and certainty of access will be impossible. Each wait entails a loss, and a succession of losses means an abandonment of the use of the wharf and of the trade which is possible only by such use. Thus, the very freedom becomes the cause of its disuse and failure to accomplish the purpose of its creation.

A public wharf at the terminus of a railroad which is part of a large export or import business is an impossibility. The right of free resort by all vessels produces conditions which kill the business itself. The sea carriage of today is done in steam vessels, and an essential of their success is certainty of dispatch. This cannot be secured if a chance comer or Ishmaelite has the right to a berth from which the regular liner must be excluded until a vacancy occurs. The liner ceases to be a liner because there is no line, it being driven out of existence by the certain losses resulting from the delays and hindrances at the wharf. The business of the railroad company is destroyed, the public suffers, and the only temporary gainer is the sporadic vessel, which, in turn, is forced to withdraw

because of the want of traffic connections with the railroad company and of profit in the business.

At this time, no successful exporting and importing business by sea can be done without the closest co-operation between the railroad taking the merchandise to and from the seaboard and the steamers taking it to and from foreign ports. Each must be informed definitely of the movements of the other, and each must co-operate with the other. Cargoes to be shipped must be collected from different points in the interior and transported to the seaboard. These collections must be more or less simultaneous, and must ordinarily precede but little in time the arrival and readiness of the steamer to load the cargoes collected. A want of coincidence between the arrival of the steamers and the cargoes means delay and loss to the railroad company or the steamer. Such want may result from a failure of the steamer to notify the railroad company of its prospective arrival, or of the railroad company to provide cargo with the requisite expedition and fullness. A failure of the steamer to secure her berth promptly, entails a loss on both.

The necessary co-operation and harmony can be secured only by business connections between the one and the other. In such case, the railroad company can arrange in advance for the cargoes and berthing of the incoming steamer, and the steamer by timely notice and effort can prevent delay to the shipper and railroad carrier.

This would be impossible if the race for the wharf facilities be free for all, for in such a race, all system, regularity and certainty is lost, and the resultant chaos is synonymous with loss to all concerned.

The uncertainty of arrival and departure prevents the proper collection of freights by the railroad company, the certain delays destroy the profits of the steamship lines, the occasional user cannot, because of the breaking down of the business of the railroad company, obtain the proper freight accommodations, even if the railroad carrier be disposed to give them, and the public stands between the upper and nether mill-stones, and sees its business interests annihilated by the fantasy of a public wharf.

It is evident, too, that no good can accrue to lines of steamers only from the right to physical connection with the wharf. As we have seen, it is well settled in the federal courts that traffic connections and co-operation cannot be forced upon an unwilling carrier; and yet, with-

out them, the right to use the wharf would be practically barren of results, for the procurement of cargoes, the arrangement for shipping them, etc., are absolutely necessary to successful shipments of products to be brought by railroads to the sea for shipment.

Besides, the railroad itself has rights. Because it is a common carrier, it is not deprived of the right to apply sound business principles to the workings of its various departments. No common law or public policy requires that for a fanciful equality of service, it should sacrifice its interests as well as the interests of the public. Discriminations have always been held justifiable when not unreasonable and unjust, taking into consideration several interests to be affected, and no court has ever held that it is reasonable to require a carrier to sacrifice any branch of its business in order that strict equality may be produced, especially when such equality must infallibly injure the public.

The very nature of a wharf and its inadequacy to meet the demands of every incoming vessel, necessitates that its use shall be exclusively for those with whom the carrier enters into arrangements. The carrier has the right to select a strong connection instead of a weak one—one able to give assurance of permanent business, instead of one which can offer only occasional shipments. (65 Fed. 39.) If the free use is incompatible with the certain, regular use by a steamer or lines of steamers with which the carrier is aligned, it seems too clear for further reasoning that such carrier has the right to accept the latter and thereby exclude the former.

An illustration or two will suffice:

The Pennsylvania Railroad Co. has docks in Jersey City for the reception and discharge of passengers on its line. It has at present ferry boats belonging to itself, bringing and taking passengers to and from the New York side of North River. If, however, it only had a contract with an independent line of ferry boats to perform this service, could an outside boat insist that it, too, had a right to bring passengers and claim a berth at the dock for their discharge, and insist that the regular boats employed by the company should wait until the berth be vacated by it? What would become of the regularity of schedule and service which the public has a right to require, and from which the railroad company has a right to make a profit? And when the interloper has succeeded in driving the

regulars off, how would the public be served? Other contracts for regular service could not be obtained because of the liability to interruption and consequent destruction of profits, and the public would not be served at all.

To make the query exactly applicable to this case: Would, in the event supposed, a passenger who came from Philadelphia to Jersey City over the railroad company's lines, have a right to insist that a ferry boat to be selected by him should be allowed to come into the railroad company's slips in order to ferry him cross, even though it delayed and excluded the regular ferry boat, and in case that the railroad company refused to permit such access to such outside boat, to bring suit against such company for such refusal to let such outside boat have the use of its terminal facilities?

Without particularizing further, what would become of the export and import business of the country if the steamship wharves in New York City, Philadelphia, Boston, Baltimore, New Orleans, etc., etc., to which the ocean liners have a right by contract to come, should open to every tramp steamer desiring to use them, and the liners be liable at any time to find their berths occupied indefinitely by one or more steamers prior in point of arrival, and they be thereby cut off from their usual rail or other connections necessary for the distribution of the freight brought by them?

There can be but one answer to a proposition which involves such consequences.

The principles governing this branch of this case are well set forth by this Court showing the impossibility where facilities of the carrier are limited, of affording such facilities to other common carriers without regard to the interests of the carrier itself or of the public. The decision mentioned was in the Express cases, where the court declined to hold that a railroad company was compelled to furnish express facilities to any express company desiring the use of its trains. Its language may be almost inserted bodily into the facts in this case by substituting the word "wharf" for "train," and the word "vessels" for "express companies." The language is as follows:

"The express business on passenger trains is in a degree subordinate to the passenger business, and it is consequently the duty of a railroad company in arranging for the express to see that there is as little interference as possible with the wants of passengers. This implies a

special understanding and agreement as to the amount of car space that will be afforded, and the conditions on which it is to be occupied, the particular trains that can be used, the places at which they shall stop, the price to be paid, and all the varying details of a business which is to be adjusted between two public servants, so that each can perform in the best manner its own particular duties. All this must necessarily be a matter of bargain, and it by no means follows that because a railroad company can serve one express company in one way it can as well serve another company in the same way and still perform its other obligations to the public in a satisfactory manner. The car space that can be given to the express business on a passenger train is, to a certain extent, limited, and, as has been seen, that which is allotted to a particular carrier must be, in a measure, under his exclusive control. No express company can do a successful business unless it is at all times reasonably sure of the means it requires for transportation. On important lines one company will at times fill all the space one railroad company can well allow for the business. If this space had to be divided among several companies, there might be occasions when the public would be put to inconvenience by delays which could otherwise be avoided. So long as the public are served to their reasonable satisfaction, it is a matter of no importance who serves them. The railroad company performs its whole duty to the public at large and to each individual when it affords the public all reasonable express accommodations. If this is done the railroad company owes no duty to the public as to the particular agencies it shall select for that purpose."

Express Cases, 117 U. S. 1 and 24.

See also:

C. St. L. & N. O. R'y Co. vs. Pullman S. Car. Co. 139 U. S. 79.

And in a case where the Judge refused to compel a railroad company to employ a particular transfer company, and decided that it had the right to select such transfer company as it might see fit as its connecting carrier, the court used the following language particularly applicable to the case at bar:

"To this end it was essential that, in selecting a company for the transfer of its freights between St. Louis and East St. Louis, it should secure one fully equipped for doing the business,—solvent and reliable. It could not

afford to take chances in so grave a matter. It might be unsafe to trust to the caprice of competing transfer companies, or to sporadic rivalries. It could not foresee how long it would be before the railroad company, in such dependence might find itself a prey to a 'combine' among the transfer companies, or become exposed to the not improbable contingency of a rivalry between competing companies, which would break both down, leaving the railroad company without a certain reliable connection with the city. It would be harsh, unreasonable, and questionable legislation that would deny to the common carrier the protection of a provident, reliable contract, like the one in question."

St. Louis Drayage Co. vs. L. & N. R. R. Co. 65 Fed. 39, 42.

We deem no further argument necessary.

Respectfully submitted,

W. A. BLOUNT,
A. C. BLOUNT, JR.
Attorneys for Defendant in Error.

UNITED STATES SUPREME COURT,

OCTOBER TERM, 1904.

No. 225.

LOUISVILLE & NASHVILLE RAILROAD COMPANY,
PLAINTIFF IN ERROR,

vs.

WEST COAST NAVAL STORES COMPANY,
DEFENDANT IN ERROR.

Certiorari to the Circuit Court of Appeals for the Fifth Judicial Circuit.

Reply Brief of W. A. BLOUNT and A. C. BLOUNT, JR., for Plaintiff in Error, the Louisville & Nashville Railroad Company.

We submit a few observations in reply to the assertions and arguments of the plaintiff.

1.

The plaintiff, on page 2 of its brief, takes occasion to show that the decision of the Circuit Court of Appeals was upon pleadings in which there was an allegation that the wharf in question was at the end of a public street.

Even though this be material, yet it cannot be considered tinhis case. After the case was remanded and sent back to

the Circuit Court the pleadings were amended, and there is no now in the case before this Court any such allegation. If it had been made below, it could have been met by us, by showing authority from the City of Pensacola and from the State of Florida to erect and maintain the wharf. The declaration did not, however, allege the fact, or any other fact rendering it necessary for us to show the character of the title and possession under which we held the wharf and we, therefore, refrained from so doing.

2

In our former brief we said that the plaintiff had not alleged any deprivation of any right which it possessed, but had only alleged that the certain vessels with which it had contracted had been denied access to our wharf and that, therefore, plaintiff. in not showing that it could not be equally well served by other vessels coming to the wharf, did not show any right of action.

To this the plaintiff replies that it alleged that we refused to permit it to ship its stores by the vessels with which it had contracted and that our plea does not allege that there were equal facilities provided by other vessels as would have been furnished by the vessels with which it had contracted.

The plaintiff, however, forgets that the burden of allegation is with it and that the demurrer to the plea relates back to the allegation.

Johnson vs. Pensacola & Perdido R. R. Co., 16 Fla., 623.

Since the plaintiff, itself, was not prevented from carriage of its goods on the wharf or from access to vessels thereat, it was incumbent on it to show not only that it could not ship by certain vessels, but that it could not ship upon any vessels upon the same terms and with equal facilities as upon those certain vessels, for whatever may have been the rights of the "certain vessels," its rights, if any, were to be

secured in its transportation of its goods from Pensacola to the port for which they were destined, with the same facilities with which others were served, and not with the facilities offered by any particular line of vessels with which it chose to contract.

3.

The plaintiff insists that this is a simple case of an ordinary *public wharf* and that its relations to the defendant as a common carrier, entitled not only to serve the public in the way best for the public good, but also to take care of its own interests, must be ignored. As we have shown, this situation cannot be left out of consideration. If, however, we accept the situation as contended for by plaintiff, it has not shown this to be a *public* wharf.

Whether in the absence of statute or custom a public use is impressed upon a given business does not depend upon the question as to how many people may use that business, or how frequent their use, but upon the question whether their use is independent of the use made of it by the owner for his own private purposes, or connected with such private purposes. If the use throws it open to the public with no purpose except to make a profit by such use, then it may be considered public, but if the owner uses it as one of the agencies of his own business, for such persons as may come to him in connection with that business, then it is not public, but private. For illustrations:

An inn-keeper who holds his lodgings open to all who may pay for the use thereof, impresses upon them a public use and must receive all proper persons alike, but the owner of a cotton factory may establish a boarding-house for his employes, for the better transaction of his own business, and may, at his pleasure, keep out such persons as he may desire.

So a person who establishes a wharf and permits all persons who may desire to load their goods thereon, or unload their goods therefrom, or to traverse the same with their

vehicles, for a compensation to be paid to him, has devoted his wharf to the public use and has become a wharfinger. It serves no purpose of his, except to render a return of emolument for the use of it by others.

But if the owner of a saw-mill on land builds in front of it a wharf for the purpose of expediting the communication between his mill and those vessels which may come to take away his goods, he does not make it a public wharf and can keep away such vessels as he may desire to refuse access to. So with the case at bar.

The plea expressly alleges, "That no business has ever been done at said wharf except the transportation by the defendant in cars on its railroad over said wharf, to and from vessels lying at the said wharf, of goods bought, or to be transported, by said vessels and the loading and unloading thereat of such vessels," and that the defendant constructed the wharf "for the purpose of providing facilities for the transaction of its business with such vessels as it might permit to come and lie at said wharf to take cargo."

This is tantamount to saying that the only use of the wharf ever intended or had has been the use by the defendant for the carrying out of contracts of carriage which it had undertaken. No persons, as a matter of right, have ever deposited goods on it, or taken goods from it, or carried goods over it. This has all been done by the defendant, who did it in carrying out his own business. The public has exercised no rights in relation to it. Only those vessels which the defendant thought could best carry out its own business were allowed to approach it and use it. Whether those vessels were or were not numerous, or, as the plaintiff puts it in its brief, "a large part of the public," is entirely immaterial, for their access was not because they were of the public, but because they bore contractual relations with the defendant. It would seem to be impossible for one to have a private wharf at which to carry on his own business, if it cannot be done by erecting

a wharf strictly for that purpose and strictly confining its use to those who should come into contractual relations with him for that purpose.

4.

Outside of the general question which we have discussed is the by far more important one, whether a railroad company having a wharf of necessarily limited facilities for the better conduct of its export business is, because in the carrying out of that business it requires and, therefore, permits, some vessels to come to such wharf, compelled to let every single vessel or line come at any and all times, and thus break up its business and prevent the rendition of export service to the public. We have discussed this in our former brief and need not discuss it again.

The plaintiff says, however, that nothing in the pleadings shows that such circumstances would have ensued in this particular case, or are not merely speculative; in other words, that it is not shown that the presence of the certain vessels contracted with by plaintiff would have prevented or driven off any connections of defendant. But the right does not depend upon the effect in this isolated instance. If the results which we picture could follow and the defendant and the public be injured, then the necessity for the prevention of such possible contingent injury creates the right. In the Express Cases (117 U. S., 1), the Court said, "No express company can do a successful business unless it is ***at all times*** reasonably sure of the means it requires for transportation. On important lines one company will ***at times*** fill all the space one railroad company can well allow for the business. If this space had to be divided among several companies, ***there might be occasions*** when the public would be put to inconvenience by delays which could otherwise be avoided." (The Italics are ours.)

5.

The Court will note that there is very respectable authority for holding that even if the wharf had been a public wharf

the defendant had a right to discontinue its public use at any time and refuse to let any particular individual use it.

O'Neil vs. Annett, 27 N. J. Law, 290;
Heany vs. Heeny, 2 Den , 625;
Bogart vs. Haight, 20 Barb., 251;
Mary K. Campbell, 31 Fed., 840;

6.

The Court will note that the research of the counsel for plaintiff has enabled him to find only one case directly in support of the decision of the Circuit Court of Appeals,—the case of the Indian River Steamboat Company against East Coast Transportation Company, 28 Fla.—and that case is founded upon the Statute of the State of Florida and upon decisions of which this Court explicitly disapproves in the Express Cases, 117 U. S., 1.

Respectfully submitted,

W. A. BLOUNT AND
A. C. BLOUNT, JR.,
Attorneys for Plaintiff in Error.

IN THE SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1904.

No. 225.

THE LOUISVILLE & NASHVILLE RAILROAD COMPANY, A CORPORATION, Petitioner,

vs.

WEST COAST NAVAL STORES COMPANY, A CORPORATION, Respondent.

On Writ of CERTIORARI to the United States Circuit Court of Appeals for the Fifth Circuit.

Brief of JOHN C. AVERY, Attorney for Respondent.

It is respectfully submitted that petitioner has not presented the real question involved in this case, which was decided by the Circuit Court of Appeals.

As stated in the opinion of that Court, in West Coast Naval Stores Company vs. Louisville & Nashville Railroad Company, 121 Fed. Rep., p. 648, "The question is whether this wharf is a public wharf, or if not public, but a private wharf, is it so located and used that the public has a right to have goods intended for shipment by water beyond Pensacola carried to said wharf and have ships moored at said wharf and there take on its goods?"

This question arose upon the case stated by the Court, thus:

"The case shows that the Louisville & Nashville Railroad Company is in the possession of a large wharf built at its own expense *on the extension of a public street in the City of Pensacola, into the deep waters of the harbor of the City*, on

which street and wharf it has laid railroad tracks connecting with its main line and depot in the City, from which tracks the railroad company carries and transports goods ordered and intended for shipment by water, making a *quasi* terminal of the said wharf."

(NOTE: It will be observed in connection with the above statement by the Circuit Court of Appeals, that the record then before that Court contained a replication (121 Fed., 647), as follows: "That the said wharf is an extension of a street of the City of Pensacola into the Bay of Pensacola, to a distance of more than five hundred (500) yards, all within the limits of the City of Pensacola and maintained by the defendant by authority and permission of the said City;" to which replication a demurrer was filed and sustained by the United States Circuit Court for the Northern District of Florida. For that reason the Circuit Court of Appeals, in its opinion (121 Fed., 648), included in its statement of the case the fact that the wharf in question was built "on the extension of a public street in the City of Pensacola." After the decision of the Circuit Court of the Northern District of Florida had been reversed by the Circuit Court of Appeals, the railroad company withdrew all of its pleas, thereby, of course, eliminating from the record replications thereto and demurrers to the replications, and filed a further and final plea, which appears at page 10, transcript of record. The plaintiff, West Coast Naval Stores Company, demurred to the plea, and, inasmuch as neither the plea nor the declaration alleged that the wharf in question was an extension of a public street, the decision of the Circuit Court upon the plaintiff's demurrer did not involve that element. When the case again reached the Circuit Court of Appeals (Louisville & Nashville Railroad Company vs. West Coast Naval Stores Company, 128 Fed. Rep., 1020), it was, without argument, disposed of by that Court as settled by the former decision of the Court, notwithstanding there did not at the last hearing appear in the record any allegation that the wharf was an extension of a street, and such view was acquiesced in by the parties. The case comes here, then, on *certiorari* without such allegation.)

Plaintiff's case is more clearly and sharply presented by the second count of the declaration (Tr Rec., pp. 6 and 7), which count the Circuit Court of Appeals considered also,

and we shall, therefore, argue the case in reference to that count That being good, it is immaterial whether the first is good or bad, as the plea applies to both, and, if bad, as a defense to the second count, the demurrer to it was properly sustained. We quote as follows from the second count:

"The course of business dealing between plaintiff and defendant then and there was for plaintiff to transfer over said switch and defendant's railway, into the City of Pensacola, by means of defendant's cars and locomotives, plaintiff's turpentine and rosin, to and upon defendant's wharf, extending into the Bay of Pensacola, which wharf was and is conducted by defendant and used by persons bringing goods over defendant's railway to and into Pensacola, to be shipped from said wharf; and at and upon said wharf to deliver plaintiff's turpentine and rosin to vessels to be in and by such vessels carried to other ports in the transaction of plaintiff's business, of which defendant had notice, and which was the duty of the defendant, as common carriers, as aforesaid, and in the conduct of the wharf, as aforesaid, which was and is a *public wharf*, for a reasonable compensation, which plaintiff was always ready and willing to pay to defendant, to give plaintiff the facilities aforesaid * * * * and that in the midst of the prosecution of its said business, which, as plaintiff avers, was a large and lucrative business, the defendant notified plaintiff that it would refuse to permit plaintiff's turpentine and rosin, of which plaintiff then and there had on hand a large and valuable stock, as defendant well knew * * * * to be *at, from or by means of defendant's said wharf* loaded upon or delivered to certain vessels, with the managers of which plaintiff had contracted for the taking thereof from Pensacola to other ports * * * * or to permit the said wharf and said railway of defendant to be used in the prosecution of the plaintiff's business aforesaid, *in so far as the prosecution thereof should involve the use of said vessels* in shipment of plaintiff's said turpentine and rosin from Pensacola."

From this it will be seen that the gravamen of plaintiff's complaint was, not that the defendant would not transport plaintiff's goods on defendant's lines, or any part of them, but only that defendant would not permit plaintiff's goods

to be at, from or by means of, defendant's wharf, loaded upon or delivered to the said vessels.

The only plea not withdrawn before the case was disposed of in the Circuit Court and thereafter in the Circuit Court of Appeals, was, "a plea to the first and second counts of the declaration," (Tr. Rec., pp. 10 and 11) which does not deny that the wharf in question was as stated in the second count of the declaration, that is, "a public wharf," excepting argumentatively by setting forth certain facts in the said plea. That plea states how the defendant built and used the wharf, admitting, among other things, that *a very large part of the public had the use of the wharf* at pleasure, to-wit, those engaged in traffic handled by vessels in regular lines running in connection with the Louisville & Nashville Railroad, and vessels belonging to, or consigned to, Gulf Transit Company, an agency of the defendant, and traffic in connection with other vessels subject to special arrangement." The plea expressly denies (Tr. Rec., p. 11) that the defendant "either notified plaintiff that it would not carry plaintiff's naval stores nor refuse to transport plaintiff's naval stores, over defendant's railway, mentioned in the declaration, to and on its wharf, also mentioned in the declaration," but admits "that the *defendant has refused to permit the certain vessels mentioned in the declaration to take goods and merchandise from its said wharf* to be transported by them to the port of New York, but that such refusal was solely because the said vessels were not of either of the classes provided for by the rules aforesaid, nor had made special arrangements with the defendant, and would have been in competitition with the lines of vessels connecting with the defendant * * * and was in competition with the defendant itself." The further allegation in the plea that the defendant was "ready and willing to give, and did give, to the plaintiff, the same facilities for shipping naval stores to New York or any other port, over defendant's said wharf as it gave to any and all other shippers," adds nothing to the defense as it is to be taken in connection with the preceding statement of the manner of discrimination made by the defendant and complained of by the plaintiff.

All that is asserted in the plea is, of course, admitted by the demurrer, and there is, therefore, left for adjudication the simple question whether, in view of what the declara-

tion alleges, which is not denied by the plea, and what the plea alleges, and is confessed by the demurrer, there is presented a case for relief.

Whether such case is or is not presented depends upon, and solely upon, whether the wharf in question "is a public wharf, or if not public but a private wharf, is so located and used that the public has a right to have goods intended for shipment *by water* beyond Pensacola carried to said wharf and *have ships moored at said wharf*, and there take on its goods."

That is the sole question which the Circuit Court of Appeals regarded as before it and undertook to decide. In the conclusion of its opinion that Court said, referring to authorities there cited and arguments there made in behalf of the railroad company, "None of these propositions are in our opinion applicable to the present case."

We think this court will find that the Circuit Court of Appeals correctly decided the question before it, and that no other or different question could have properly been adjudicated upon the record there made.

We do not feel that we can add anything to the strength of the opinion of the Circuit Court of Appeals (121 Fed., 648), but venture to submit the following:

1

It was contended by defendant below that the last clause of Section 3, p. 530, U. S. Revised Statutes, or Interstate Commerce Act, secured to the defendant the right to control the wharf in question as a private wharf. It was there said that the pivotal question raised by the demurrer was whether the defendant could refuse to permit a steamboat carrying on a business competitive with the defendant to use its terminal facilities, and that, no matter what might be the common law upon this point, the matter is controlled by the Interstate Commerce Act. The clause of that act referred to is this: "But this shall not be construed as requiring any such common carrier to give the use of its tracks or terminal facilities to another carrier engaged in like business."

But, what is involved here is terminal facilities, not within the Interstate Commerce Act, but merely a public

wharf. In the State of Iowa vs. Chi., Wilwaukee & St. Paul Rwy. Co., 33 Fed., 391, the Court said:

"It is also urged that the action of the commissioners, sought to be enforced in this proceeding, is in contravention of the last clause of Section 3 of the Act of Congress, approved Feb. 4, 1887, and known as the Interstate Commerce Act. In that section of the act it is provided that any common carrier, subject to the provisions of the act, must afford equal facilities for the interchange of traffic between their respective lines, receiving and delivering all passengers and property to and from their several lines and those connected therewith. And then comes the clause relied on, as follows: 'But this shall not be construed as requiring any such common carrier to give the use of its tracks or terminal facilities to another carrier engaged in like business.' The meaning of this clause is clear. It simply declares that the preceding provision of the section shall not be deemed to give the right to one carrier to use the tracks or terminal facilities of another carrier in a like business. It has reference to the effect of the Act of Congress, and nothing else. If the defendant company, by contract with the City of Dubuque, has bound itself to allow other companies to use part of its track or terminal facilities, this clause of the Act of Congress does affect such a contract or an enforcement thereof. So, also, if the State of Iowa has provided by a particular statute that different companies may have a joint or common use of certain terminal facilities, rights of the several companies to such joint use are not affected by the provisions of the Interstate Commerce Act, but the same must be measured and determined by the statutes of the State."

And, in the case of Swift vs. P. & R. R. Co., 58 Fed., 860, Judge Grosscup says:

"There can be no doubt but that to courts is given by the Constitution the absolute power of regulating commerce between the States. This power, independently of legislation, is not necessarily exclusive of the statutes to reasonably regulate such incidents in interstate commerce lying within their respective jurisdiction, as wharves, harbors, pilots, roads, bridges, &c. A wharf, harbor or bridge lying within the statute is a tangible entity, over which the laws of the State extend. The cost of their creation and the expense of their maintenance make the imposition of

tolls or charges not only reasonable, but necessary. This must be enforced by, and subject to, some law, and, in the absence of Congressional legislation, there is no law except that of the State. The application of State law in such cases is not inconsistent with the general power conferred upon Congress, and does introduce into commerce either confusion or restraint. Such regulations may exist harmoniously with regulations imposed by other states upon wharves, harbors and bridges within their territory or limits, but the fixing of a rate for the carriage of goods from one state is not simply the incident of or appurtenance to commerce, but is the very core and essence of interstate commerce."

It is apprehended that the foregoing correctly states the law in so far as the Interstate Commerce Act is involved. It is submitted that the case at bar is not within the operation of that act, and that the COMMON LAW *must govern in determining the rights of the parties.*

Applying the *common law* to the case made by the declaration and plea involved in the demurrer now under consideration, the right of plaintiff seems to be clear. While some of the Federal Courts have held that there is no "National Common Law" applicable in the Federal Courts, the Supreme Court of the United States, in Western Union Tel. Co. vs. Call Pub. Co., 181 U. S., 101, has said:

"There is no body of common law separate and distinct from the common law existing in the several states, in the sense that there is a body statute law enacted by Congress separate and distinct from the body of statute law enacted by the several states. * * * * * Can it be that the great multitude of interstate commercial transactions are free from the burdens created by the common law as so defined, and are subject to no rule except that to be found in the statutes of Congress? We are clearly of opinion that this cannot be so, and that the principles of common law are operated upon all interstate commerce transactions, except so far as they are modified by Congressional enactment. * * * * * Reference may also be had to the elaborate opinion of Judge Shiras, holding the Circuit Court of the Northern District of Iowa, in Murray vs. Chi. & N. N. W. Rwy., 63 Fed., 24, in which

is collated a number of extracts from opinions of this Court, all tending to show the recognition of a general common law existing throughout the United States."

What, then, is the *common law* applicable to and governing the relations of the parties to this action in the circumstances set out in the pleadings?

The Supreme Court of the State of Florida, in Indian River Steamboat Co. vs. East Coast Trans. Co., 28 Fla., 433, says:

"If either company should erect a dock or wharf for its private use, we know of no law to prohibit it. * * * Undoubtedly, if either company should erect a dock or wharf and open it to the public for a general wharfage business, the public would have a right to use the same under such regulations and upon the payment of such charges as the owner might fix, or as might be regulated by law. * * * * But we are not dealing with the sole question of ownership or rights in reference to a dock or wharf * * * * but it also appears that upon this dock is the tracked terminus of a common carrier."

And, at page 435 the court says:

"The real question presented here is, can complainant corporation, engaged in carrying freight and passengers on the Indian River by means of steamboats, rent from a railroad common carrier its dock on said river on which its track and terminal facilities are located and exclude others from renting at said terminal point for the purpose of delivering and receiving freight and passengers to and from said common carrier? This question, we think, must be answered in the negative. If it be competent to sustain such a contract the common carrier can select one connecting line of boats and exclude all others from doing business with it. Such a doctrine would lead to the legalizing of a monopoly and the sanction of an unfair and unjust preference between connecting and competing lines of transportation. We do not understand that a common carrier ever had such power as this."

The law of this Florida decision was fully sustained, and the opinion of the Court complimented, in Or Short Line Rwy. Co vs. I. R. M. Co., 51 Fed., 611. The decision there, as stated in the headnote, is this:

"A railroad company owning a wharf extending into

public navigable waters, maintained thereon a station and passenger depot, and used the wharf for its own line of steamers in connection with its railroad traffic, *held:* That a steamboat company not a rival of the railroad company in its railroad business was entitled to use the wharf for a reasonable compensation, to the extent of receiving and discharging passengers and freight."

In the opinion reference is made to the above cited decision of the Supreme Court of Florida, as follows:

"Rather than extend this opinion by even referring to the numerous authorities bearing upon the questions involved, I will merely refer to the very instructive opinion of the Supreme Court of Florida in the recent case of Indian River Steamboat Co. vs. East Coast Trans. Co., 10 So. Rep., 480, and the cases therein cited."

It is true that this case was reversed in I. R. M. Co., vs. Or. Short Line & W. N. Rwy. Co., 57 Fed., 673, but the decision of the case did not militate against the principle now under consideration, as appears from the statement of it in the headnote, to-wit:

"A transportation company operating a railway and a line of steamboats connecting at the company's wharf, is not required by the 3rd section of the Interstate Commerce Act to permit the boats of a competitor to land at such wharf."

And it is to be observed that in the body of the opinion there is the following statement:

"That defendant has, during all the time since it constructed the said wharf, *used it as its own private property, and not as a public wharf, and has refused at all times to allow any other person or persons, firm or corporation to use it or share in the use thereof.*"

In the present case the situation is entirely different. The declaration alleges (Tr. Rec., p. 6): "The defendant's *wharf extending into the Bay of Pensacola,* was and is conducted by defendant and used by persons bringing goods over defendant's railway to and into Pensacola, to be shipped from the said wharf * * * * *which was and is a public wharf.*"

Such allegations are only met, as we have already pointed out, in an argumentative way by a skillfully

worded plea, the statements of which, when analyzed, will be found not to negative the description of the wharf as stated in the declaration.

It is believed that this Court will discover that the wharf in question was operated by the defendant, not as a private wharf, but for use not only by the boats operated by it and the Gulf Transit Company, but also *by all persons with whom the defendant* should see fit to make "special arrangements." That is, it appears that *the wharf was not a private but a public wharf;* it was used, not only in the private business of defendant, but as a facility in the navigable waters of the Bay of Pensacola, in aid of commerce engaged in by the Louisville & Nashville Railroad Company and by the Gulf Transit Company, and *by all the rest of the* PUBLIC, which is described in the plea as "persons with whom the defendant should make special arrangements for traffic in connection with vessels other than those of the Louisville & Nashville Railroad Company and the Gulf Transit Company."

It is perfectly obvious that the course of the defendant was to give to *a very large portion of the* PUBLIC the right to use its wharf, with the result that such wharf became a facility in which *the public as a public had become interested* in such manner and to such extent as to deprive the defendant of the right to claim that it was a private wharf, in the operation of which the public were not entitled to insist that *equal privileges were to be accorded to all persons requiring them in their respective businesses.*

The law as to a wharf in such circumstances is thus stated by the United States Supreme Court in the case of Munn vs. Ill., 94 U. S., 125:

"Looking then to the common law, from whence came the right which the constitution protects, we find that when private property is affected with a public interest, it ceases to be *juris privati* only. This was said by Lord Chief Justice Hale more than one hundred years ago, in his treatise *De Portibus Maris*, 1 Harg. Law Tracts, 78, and has been accepted without objection as an essential element in the law of property ever since. Property does become clothed with a public interest when used in a manner to make it of *public consequence* and affect the community at large. When, therefore, one devotes his

property to *a use in which the public has an interest*, or in effect grants to the public an interest in that use, and must submit to be controlled by the public for the common good to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use, but so long as he maintains the use he must submit to the control."

"Thus as to ferries Lord Hale says, in his treatise *De Portibus Maris*, 'The king has a right of franchise or privilege that no man may set up a common ferry for all passengers without a prescription time out of mind or a charter from the king. He may make a ferry for his own use or the use of his family, but not for the common use of all the king's subjects passing that way, because it doth in consequence tend to a common charge and is become a thing of public interest or use, and every man for his passage pays a toll,'" &c.

This Court has also said in Dutton vs. Strong, 1 Black (U. S) 33:

"Whether a wharf is private or public may depend in case of dispute upon several considerations involving the purpose for which it was built, the use to which it has been applied, the place where located and the nature and character of the situation."

The law is also similarly stated in Gould's Law of Waters, 231, 232, and 1 Dillon's Mun. Corps., §68.

In Compton vs. Hawkins, 8 So. Rep. (Ala.), 75, the Court said:

"Whether a wharf or landing is public or private depends upon the ownership of the soil, the purpose for which it was erected, the uses to which it has been applied and the nature and character of the structure If the land on which it is constructed is vested in the public, or if built by public authority on land condemned, or if it be at the terminus of a public highway and practically form a part thereof, or has been dedicated by the owner to the use of the public, it may be regarded as a public wharf or landing."

Barrington vs. Commercial Dock Co., 45 Pac. (Washingington), 748, 33 L. R. A., 116, is quoted by the Circuit Court of Appeals (121 Fed., 649) in support of the decision

there made. We shall, therefore, refrain from incumbering this brief with a repetition thereof.

2

In the brief for petitioner it is said that there is no allegation that the public, or plaintiff as one of the public, has not been fully served in the facilities provided by the defendant for the transportation of exports from the end of its line (its wharf) to the unnamed ports mentioned in the declaration to which the plaintiff desired to ship.

We are at a loss to understand this statement, because it is directly alleged in the declaration as follows: "The defendant notified plaintiff that it would refuse to permit plaintiff's turpentine and rosin, of which plaintiff then and there had on hand a large and valuable stock, to be at, from or by means of its said wharf loaded upon or delivered to certain vessels, with the managers of which plaintiff had contracted for the taking thereof, from Pensacola to other ports, to which plaintiff intended and had made "arrangements to ship the same, or to permit the said wharf of defendant to be used in the prosecution of plaintiff's business, as aforesaid, in so far as the prosecution thereof should involve the use of said vessels in shipment of plaintiff's said turpentine and rosin from Pensacola, by means whereof plaintiff sustained great loss and damage."

And then follows specifications of damages.

And it should also be remembered that the declaration also alleges "that the course of business dealing between plaintiff and defendant was for plaintiff to transfer over the said switch and defendant's railway, into the City of Pensacola, by means of defendant's car, and locomotives, plaintiffs turpentine and rosin to be upon defendant's wharf," and that "in the midst of the prosecution of its said business, defendant notified plaintiff that it would refuse to permit plaintiff to use defendant's wharf for the purposes stated."

3

In brief for petitioner it is also suggested (Tr. Rec., p. 25), referring to the Express Cases, 117, U. S., 1, that if a carrier affords all reasonable accommodation it owes no duties to the public as to the particular agencies it shall select for that purpose.

But in this case it does not appear that the defendant offers to the plaintiff reasonable accommodations for the transportation of plaintiff's naval stores from the port of Pensacola, but defendant boldly plants itself upon the contention, not that it was prepared to furnish facilities to complainant, and that such was the reason for the course taken, but that, to permit plaintiff to carry on its business as it desired to do would be to bring in competition with the defendant railroad company and lines constituting its agencies and lines with which it intended to contract. In other words, that its intention was if possible to force plaintiff to patronize the agencies and lines mentioned, without asserting that such agencies and lines could accommodate the plaintiff, or would be willing to do so under any circumstances.

4

We fail to discover that plaintiff's contention in this case and the ruling of the Circuit Court of Appeals make a case within the description of either of the special grounds for the petition in *certiorari*. We do not find that the decision of the Circuit Court of Appeals is in conflict with the decisions of this Court, or contrary to the decisions of other Circuit Courts of Appeal. or in conflict with the decisions of the English Courts and the higher State Courts of Appeal; neither can we concur in the contention that the question involved is of national importance or of international importance.

5

The brief of the petitioner insists that plaintiff makes no case of discrimination against it. The gist of the case is not that there has been a discrimination; it is that the wharf in question has been given to the public to the extent stated in the declaration and admitted in the plea, and that *such action impresses upon the wharf a public character*, on account of which the public, of which the plaintiff is one, has the right to make such reasonable use of the wharf as it may desire, so long as in doing so it does not interfere with the use thereof by the defendant or other portions of the public.

In this connection we may refer to the suggestion made in the brief of the petitioner, illustrated by the case of the

Pennsylvania R. R. Co., which has docks in Jersey City for the reception and discharge of passengers on its line. It is said in the brief (p. 20): "If, however, it only had a contract with the independent line of ferry boats to perform this service, and an outside boat insisted that it too had a right to bring passengers and claim a berth at the dock for their discharge, and insisted that the regular boats employed by the company should wait until the berth was vacated by it, would, in the event supposed, a passenger who came from Philadelphia to Jersey City over the railroad company's lines, have a right to insist that the ferry boat selected by him should be allowed to come into the railroad company's slips in order to ferry him across, even though it delayed and excluded the regular ferry boat?"

We submit that the suggestion and illustration are extreme and are entirely aside from the conditions of the instant case. If it appeared in this case that only boats belonging to the defendant, or boats hired by defendant, were permitted to use the wharf in question, there might be some basis for the contention that the wharf was a private one. If it was alleged that the use that the plaintiff intended to make of the wharf by bringing there the boats with which it had contracted would embarrass the business of the defendant, as would be the situation with the Pennsylvania ferry if other ferry boats sought to obtain use of its limited wharf space, there might perhaps be some reason in the contention, but the suggestion made and the illustration offered are so foreign to the case made by the pleadings here before the Court, that it is believed that further comment upon them is unnecessary.

We will add, by referring to the *Express Cases*, upon which so much stress is laid by petitioner's counsel, that the language of this Court in those cases is such as to indicate that they have no application to the instant case and cannot assist the Court in deciding it.

We quote from it as follows:

"The car space that can be given to the express business on a passenger train is, to a certain extent, limited, and, as has been seen, that which is allotted to a particular carrier must be in a measure under his exclusive control. No express company can do a successful business unless it is at all times reasonably sure of the means it requires for transportation. On important lines one company will at

times fill all the space one railroad company can well allow for the business. If this space had to be divided among several companies, there might be occasions when the public would be put to inconvenience by delays which could otherwise be avoided. So long as the public are served to their reasonable satisfaction, it is a matter of no importance who serves them. The railroad company performs its whole duty to the public at large, and to each individual, when it affords the public all reasonable express accommodations. If this is done the railroad company owes no duty to the public as to the particular agencies it shall select for that purpose."

The pleadings in this case do not show such a situation as was before this court in the *Express Cases.*

Respectfully submitted,

JOHN C. AVERY,
Attorney for Respondent.

Supreme Court of the United States.

No. 225.—October Term, 1904.

The Louisville and Nashville Railroad Company, Petitioner, vs. The West Coast Naval Stores Company. } On writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

[May 29, 1905.]

Certiorari to the Circuit Court of Appeals for the Fifth Circuit to review a judgment of that court affirming one in favor of the West Coast Naval Stores Company, (hereinafter called the plaintiff,) against the Railroad Company, (hereinafter called the defendant,) for damages for refusing to permit the plaintiff to use the wharf of defendant at Pensacola for the transportation of plaintiff's property, as stated in the declaration.

The action was brought in the Circuit Court of the United States for the Northern District of Florida.

The plaintiff's declaration contains two counts, which are substantially the same, and it is therein averred that the plaintiff is a citizen of Florida and the defendant is a citizen of Kentucky, and that the latter is a common carrier, and carries goods into Pensacola over its railroad, and among them the goods of the plaintiff. The course of business between the two companies has been for the plaintiff to obtain transportation of its turpentine and rosin from its yard near Pensacola, and its warehouse in that city, by means of a switch, built for that purpose by the defendant, to defendant's main line, and thence to the wharf of defendant, (which plaintiff alleged was a public wharf,) by means of the cars and upon the railroad of the defendant. The wharf extended into the bay of Pensacola, and was used by defendant (and by persons bringing goods over the defendant's railway to and into Pensacola) for the purpose of shipping such goods from the wharf to vessels destined for other ports. After defendant had transported the goods of the plaintiff to the wharf of defendant, the plaintiff had been accustomed to ship to other ports by vessels, with the managers of which plaintiff had contracts of carriage; that in the midst of the prosecution of such business defendant had notified plaintiff that it would thereafter refuse, and it did thereafter refuse, to allow plaintiff to transport its goods to the wharf for the purpose of there loading them on such vessels as above mentioned, and refused to permit the wharf and railway of defendant to be used in the prosecution of plaintiff's business, in so far as the prosecution would involve the use of the vessels chosen by the plaintiff for the shipment of the goods from Pensacola, to the damage of the plaintiff, as set forth in the declaration.

The defendant filed several pleas to this declaration and the plaintiff demurred to them, which demurrer was overruled by the Circuit Court. Upon writ of error the Circuit Court of Appeals reversed that judgment, (121 Fed. Rep. 645,) and when the case came down the defendant withdrew all former pleas and filed in the Circuit Court another plea, as follows:

"The defendant, withdrawing all former pleas, pleads to the first and second counts of the declaration as follows:

"1. That the defendant has adequate depots and yards in the city of Pensacola for the receipt and delivery of all merchandise committed to it for transportation to, and delivery at, Pensacola. That neither its charter nor any statutory law has compelled or required, or compels or requires it to construct or maintain the wharf mentioned in the declaration, but that it constructed the same at an expense to it of tens of thousands of dollars, for the purpose of providing facilities for the transaction of its business with such vessels as it might permit to come to and lie at said wharf to take cargo. That no business has ever been done at said wharf except the transportation by the defendant in cars on its railroad over said wharf to and from vessels lying at the said wharf, of goods brought, or to be transported, by said vessels and the loading and unloading thereat of such vessels. That in accordance with such purpose it made and promulgated, upon the construction of said wharf, and more than five years prior to the bringing of this suit, rules and regulations, by which it limited the use of its wharves, including the wharf mentioned in the declaration, 'to traffic handled by vessels in regular lines running in connection with the Louisville and Nashville Railroad, and vessels belonging to, or consigned to, Gulf Transit Company,' (an agency of defendant,) and making the use of said wharves 'for traffic in connection with vessels other than herein referred to,' 'subject to special arrangement.' The said rules and regulations were in operation and enforced by defendant from the time of their promulgation, as aforesaid, up to, and at the time of, the refusal of the defendant to permit the naval stores of the plaintiff to be loaded from its wharf into the 'certain vessels' mentioned in the declaration, and still are in force and operation. That the said 'certain vessels' were not regular lines running in connection with the Louisville and Nashville Railroad, nor were they belonging to, or consigned to, Gulf Transit Company, nor had they made any special arrangements with the defendant for the use of the said wharf, but that said vessels constituted an independent line between New York and Pensacola, and New York, and Mobile, Alabama, carrying merchandise between the said points, and would have come in competition with a line of steamers with which the defendant was then negotiating for regular service in the transportation of merchandise to and from New York and Pensacola in connection, and under traffic arrangements, with defendant, and such service has since been established, and a line of steamers is now regularly transporting merchandise between said points in such connection, and under such traffic arrangements; and was also in competition with the defendant itself, which was, at said time, and had been for a long time prior thereto, engaged in a like business between said points, carrying goods by its line of railroad from Pensacola and Mobile to River Junction, Florida, Cincinnati, Ohio, and Montgomery, Alabama, and there delivering the same to a connecting carrier and other

carriers connecting therewith, transporting goods to the city of New York, and receiving from said connecting carriers at the points aforesaid, and transporting to Pensacola and Mobile, goods shipped from New York to Pensacola and Mobile.

"That the defendant has not either notified plaintiff that it would not carry plaintiff's naval stores nor refused to transport plaintiff's naval stores over its railway mentioned in the declaration, to and on its wharf also mentioned in the declaration; that it has at all times so transported them when requested so to do by the plaintiff; that the defendant has refused to permit the certain vessels mentioned in the declaration to take goods and merchandise from its said wharf to be transported by them to the port of New York, as aforesaid, but that such refusal was solely because the said vessels were not of either of the classes provided for by the rules aforesaid, nor had made special arrangements wtth the defendant, and would have been, as aforesaid, in competition with the lines of vessels connecting with the defendant, running to and from New York, and was, as aforesaid, in competition with the defendant itself in its rail transportation aforesaid to and from New York city; and that the defendant was then, and at all times had been, ready and willing to give, and did give, to the plaintiff the same facilities for shipping naval stores to New York, or any other port, over defendant's said wharf, as it gave to any and all other shippers; that the unloading by the plaintiff of its said goods into said vessels necessarily involves the lying at, attachment to and use of the said wharf, one of the terminals of the defendant, by the said vessels; that the said wharf was not at the time mentioned in the declaration, and has never been, a public wharf, unless the facts set forth hereinbefore in this plea constituted it such."

This plea was in substance the same as the third plea, which defendant had theretofore interposed and which the Circuit Court of Appeals had held bad. The plaintiff again demurred. The Circuit Court sustained the demurrer, in accordance with the decision of the Circuit Court of Appeals, and gave leave to the defendant to amend as it might be advised. The defendant refused to amend. Judgment was then entered against it by default and direction given to proceed with the case for the purpose of having plaintiff's damages assessed. A trial by jury upon the question of damages was had, and the jury found a verdict for the plaintiff for one thousand dollars, upon which judgment was duly entered.

The defendant then sued out a writ of error to the Circuit Court of Appeals for the Fifth Circuit, which court, adhering to the views expressed by it on the former appeal, affirmed the judgment, (128 Fed. Rep. 1020,) and the defendant thereupon applied to this court for a writ of certiorari, which was granted, and the case is now here.

Mr. Justice PECKHAM, after making the foregoing statement, delivered the opinion of the Court.

When this case was first before the Circuit Court of Appeals it was stated in the opinion which was then delivered that the case showed that

the railroad company was in possession of a large wharf, built at its own expense, "on the extension of a public street in the city of Pensacola into the deep waters of the harbor of the city." On looking at the record before us we find in the pleadings no averment that the wharf in question was in fact built as such an extension. The statement of facts preceding the opinion of the Circuit Court of Appeals shows, however, that there were replications filed to the various pleas, one of which replications contained the averment that the wharf was an extension of a street of the city of Pensacola into the bay of Pensacola for a distance of more than five hundred yards, all within the limits of the city of Pensacola, and maintained by the defendant by authority of the city. Hence the statement in the opinion was perfectly correct. Subsequently to the decision of the Circuit Court of Appeals, and after the case was remanded to the Circuit Court, it appears by the record before us that the defendant withdrew all its former pleas and filed the single plea set forth in the foregoing statement of facts. To this plea no replication was filed. Counsel for the plaintiff admits that neither the declaration nor the plea contains any averment that the wharf in question was an extension of a public street. If we assume, what is without doubt the fact, that the wharf was built at the foot of a public street in the city of Pensacola and was carried out into the deep water of the bay some hundreds of yards, we must also assume the fact mentioned in the brief of the defendant, and substantially set forth in the former replication, that the building and maintaining of the wharf were authorized by authority from the city of Pensacola and also from the State of Florida. These facts will therefore be taken as admitted, in order that the case may be discussed upon the facts as they really exist.

Counsel for plaintiff now asserts, and we assume, that the gravamen of plaintiff's complaint is, not that the defendant would not transport plaintiff's goods, or any part of them, on defendant's lines, from the wharf in question, "but only that defendant would not permit plaintiff's goods to be at, from or by means of defendant's wharf loaded upon, or delivered to, the said vessels," with the managers of which plaintiff had contracted to have its goods transported to other ports. This means of transportation, by such vessels as plaintiff should choose, is asserted by it as a right, because it contends that the wharf of defendant, under the averment to that effect in the declaration and not denied, in terms, in the plea, taken in connection with the facts stated in such plea, was a public wharf, or that, at least, the defendant had devoted it to a public use. The defendant in its plea sets up facts which it avers show the wharf was not a public one. The plaintiff insists that the plea shows that the defendant built and used the wharf itself and permitted a large part of the public to use it, including, at any rate, those who were engaged in traffic handled by vessels belonging to

regular lines running in connection with the defendant, and also including vessels belonging or consigned to the Gulf Transit Company, an agent of defendant, together with those who were using the wharf under some special arrangements between them and the defendant. All this, the plaintiff contends, amounted to making the wharf a public one, or at least that it thereby became a facility, to the use of which the public as a public had a right on payment of reasonable compensation. If plaintiff chose to employ, for the further transportation of its goods, the vessels with the managers of which the defendant had some business arrangement or contract, it is not denied that the defendant would and did permit such transportation. In this respect there is no allegation that the plaintiff did not have equal facilities with all other shippers. Defendant's plea avers that it did give to plaintiff the same facilities for shipping its goods over defendant's wharf that it gave to any or all shippers. In brief, the fact seems to be that the only complaint of the plaintiff is that defendant will not permit competing vessels to make use of its wharf for the purpose of such competition.

We do not see that the fact that the wharf was erected under authority from the city, at the foot of a public street of the city, makes any material difference in the character of the wharf or that the right of plaintiff to select its own vessels to continue from that wharf the transportation of its goods is on that ground enhanced, or the right of defendant to control the wharf for its own use when erected is thereby diminished. The right to erect the wharf was granted by the proper authorities, and so far as the record shows, it was granted without imposing any conditions as to its use by the public. We think the plaintiff had no right of access to the wharf founded simply upon the fact that it was erected under proper authority, in the harbor of Pensacola and at the foot of one of the public streets of that city. The question of the rights of plaintiff must really turn upon the character of the use of the wharf, whether it is public or private.

The argument upon the part of plaintiff is in substance this: True, defendant has erected a wharf, which is not in fact intended or used as the terminus of its road at Pensacola, adequate yards and depots having been furnished by the defendant for all goods and passengers destined to Pensacola only; but the wharf has been erected to enable defendant to more conveniently carry out contracts for transportation beyond its own line, which it was not compelled to make, and which it could carry out by such agencies as it chose; but the plaintiff, having goods destined for points outside of Florida, insists upon its right to use the road of defendant, not to carry these goods to Pensacola, but to defendant's wharf, so that plaintiff may there transfer them into vessels which it has arranged to take them; in order to do this it is necessary that defendant be compelled to share its possession of its own wharf, with the managers of these other vessels; for this possession plaintiff is prepared to make reasonable com-

pensation. This right on the part of the plaintiff is urged as the result of the action of defendant in permitting the use of the wharf as stated in the plea. By such use it is contended that the defendant in effect dedicated the wharf to the public, or at least has granted to the public an interest in the use of the wharf.

We are of opinion that the wharf was not a public one, but that it was a mere facility, erected by and belonging to defendant, and used by it, in connection with that part of its road forming an extension from its regular depot and yards in Pensacola, to the wharf, for the purpose of more conveniently procuring the transportation of goods beyond its own line, and that defendant need not share such facility with the public or with any carriers other than those it chose for the purpose of effecting such further transportation.

Neither the public nor the plaintiff had such an interest in the wharf as would give to either the right to demand its use on payment of reasonable hire. Nor was the wharf a depot or place of storage of the defendant for goods to be delivered at or taken from the city of Pensacola for transportation by rail. The defendant had adequate depots and yards in that city for the proper storage of all merchandise committed to it for delivery at Pensacola, or there received, to be transported therefrom by defendant. All consignees of goods at Pensacola had equal facilities for obtaining them there. Although not bound originally to carry goods beyond its own terminus at Pensacola, yet the defendant might agree to do so, and it had the right, when duly authorized by the proper authorities, to construct facilities to enable it to continue such transportation beyond the line of its railroad, by such other carriers as it might agree with. The city or State authorities in granting the right to erect such facilities might, of course, have attached such conditions as they thought wise, but in their absence neither the public nor this plaintiff, as the owner of goods, would have the right, on this state of facts, to go to the wharf with vessels for the purpose of continuing transportation of goods in competition with the defendant. The defendant never became a common carrier, as to this wharf, in the sense that it was bound to accord to the public or to plaintiff a right to use it upon payment of compensation. We do not see that the plaintiff had any right even to demand that the defendant should carry plaintiff's goods on the rails defendant had laid down to reach the wharf from its depot or yards at Pensacola, the terminus of its road at that city. Those rails were only laid for the purpose of reaching the wharf, in order that defendant might carry goods to it which it had undertaken to forward, by itself or by vessels it had arranged with, beyond its line. Very likely it would be bound to carry plaintiff's goods on this part of its rails, for the same purpose and on the same terms it did for others, viz., in order that it might itself, or through others it had contracted with, forward the

goods beyond its own line. But plaintiff demands more than this; it demands that defendant shall carry plaintiff's goods over its rails thus laid, in order that plaintiff may itself forward its goods by vessels of its own selection, and that defendant shall surrender possession of enough of its wharf to enable plaintiff to do so.

That the defendant had the right to choose its own agencies and grant to them the exclusive privilege of access to its own wharf, which it built only for the purpose of continuing the transportation of goods which it had transported to the end of its line, has in effect been decided by this court. (*Atchison &c. R. R. Co.* v. *The New Orleans &c. Co.*, 110 U. S. 667.) In that case it was held that, although at common law the common carrier was not bound to carry beyond its own lines, yet it might contract to do so, and in the absence of statutory regulations prohibiting it the carrier might determine for itself what agencies it would employ to continue the transportation, and it was not bound to enter into agreements for such transportation with another because it had done so with one common carrier. Having the right, as the authorities prove, to decide what agencies it would employ for the purpose of transporting goods beyond its own line, and not being bound to enter into any contracts or arrangements with one person or carrier because it had so contracted or arranged with another, we think it follows that defendant was not obliged to permit the public to have access to its wharf, built for the purpose stated, simply because it granted such permission to those with whom it made arrangements of the kind set forth in the plea. While refusing to make any agreement with defendant for the further transportation of plaintiff's goods beyond Pensacola, plaintiff nevertheless claims a right to use the wharf erected by defendant for its own purpose, as already stated. This cannot be sustained. The principle stated in the above case is in substance recognized in *Gulf &c. R. R. Co.* v. *Miami S. S. Co.*, (86 Fed. Rep. 407;) *Little Rock &c. Co.* v. *St. Louis &c. Co.*, (63 Fed. Rep. 775,) affirming same case in 59 Fed. Rep. 400. The two last cases involved the construction of the Interstate Commerce Act, but they affirm the principle that a common carrier may agree with such other carrier as it may choose, to forward beyond its own line the goods which it had transported to its own terminus. See also *Central Stock Yards Co.* v. *L. & N. Railway Co.*, (192 U. S. 568–571;) *Kentucky &c. Co.* v. *L. & N. R. R. Co.*, (37 Fed. Rep. 567;) *Oregon &c. Co.* v. *Northern Pacific R. R. Co.*, (51 Fed. Rep. 465;) *Ilwaco &c. Co.* v. *Oregon Co.*, (57 Fed. Rep. 673.)

The cases cited did not involve rights of parties to a wharf situated in a harbor, but we think that the right of one carrier to enter into arrangements with another carrier to forward its goods, and to refuse to do so with others, or to permit such others to avail themselves of the facilities constructed by the original carrier for that purpose, is not altered because the facility so constructed by it happens to be a wharf in the harbor of a city instead of

some structure on land. The wharf may be a private one, and its owner may permit those only to have access to it that it may choose. A private wharf may exist on the shores of a navagable river or lake, or in a harbor of a city from which access is obtained directly to the sea. (*Dutton* v. *Strong*, 1 Black, 23, 32.)

It is to be remembered that the wharf was not in strictness the terminus of defendant for unloading its goods for Pensacola. The defendant had other depots and yards for that purpose. The main use of the wharf was only for the purpose of sending the goods brought by defendant, to other ports as a continuation of their carriage beyond the line of the defendant's road. How much space, if any, it might devote to other vessels, with the managers of which it might make special arrangements, would naturally be for the defendant to decide, as also the particular terms of such arrangements. The conveniences of the wharf are, of course, necessarily limited.

It is well said by counsel for defendant in their brief that "The very nature of a wharf and its inadequacy to meet the demands of every incoming vessel necessitates that its use should be exclusively for those with whom the carrier enters into arrangements. The carrier has a right to select a strong connection instead of a weak one, one that will give assurance of permanent business, instead of one that can offer only occasional shipment. If the free use is incompatible with the certain regular use by the steamer, or lines of steamers, with which the carrier is aligned, it is too clear for further reasoning that such carrier has the right to accept the latter and thereby exclude the former."

The reasons for permitting such use of the wharf are manifold. Without it the commerce of the country in the large cities would be cramped, if not very greatly damaged, by the uncertainty of finding quarters for the regular and swift unloading and loading of the vessels. But the capacity of a wharf is necessarily limited, and if the wharf were open to all comers in their turn there could be no certainty as to any particular vessels being able to reach the wharf at any definite time, and consequently there would be a like uncertainty as to when such vessel would be able to depart with its load. One, unexpected, so-called, tramp vessel might, by arriving a few hours in advance, take possession of all that was left of the wharf for the purpose of loading, and thus prevent the regular steamer, arriving a little later, from coming to the dock, unloading its cargo, and then loading with goods from the railroad. In this way there would be confusion in time and in the possession of the wharf by the different vessels, and its value for the purpose for which it was erected would be greatly reduced, if not wholly destroyed.

The principle herein recognized has also been affirmed by this court in what are known as the *Express Cases*, (117 U. S. 1,) where it was held (because the facilities were necessarily limited) that railroad companies

had the right to contract with particular express companies for the transportation of the traffic of the latter over the lines of their railroads, and that the railroad company was not bound to transport the traffic of independent express companies over its lines in the same manner in which it transported the traffic of the particular companies contracted with; in other words, that the railroad companies were not bound to furnish, in the absence of a statute, to all independent express companies, equal facilities for doing an express business upon their passenger trains.

These observations answer the contention of plaintiff that defendant, by erecting the wharf and using it in the way it does, has thereby devoted its property to a public use, and that it has thereby granted to the public an interest in such use, within the principle laid down in *Munn* v. *Illinois*, (94 U. S. 113.) It has not devoted its wharf to the use of the public in so far as to thereby grant to every vessel the right to occupy its private property upon making compensation to defendant for the exercise of such right. The reasons we have already endeavored to give.

The judgments of the Circuit Court of Appeals and of the Circuit Court for the Northern District of Florida are reversed, and the case remanded to the latter court for further proceedings not inconsistent with this opinion.

Reversed.

Mr. Justice HARLAN dissents.

True copy.

Test:

Clerk Supreme Court, U. S.